

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 287

JOHN BARR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
CUSTOMS AND PATENT APPEALS**

PETITION FOR CERTIORARI FILED JULY 26, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1944.

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**IN UNITED STATES COURT OF CUSTOMS AND
PATENT APPEALS**

CUSTOMS APPEAL No. 4461

THE UNITED STATES, Appellant

vs.

JOHN BARR, Appellee

PETITION FOR REVIEW—Filed September 8, 1943

To the Honorable the United States Court of Customs and
Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the annexed Schedule A, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your petitioner is dissatisfied are set forth in the annexed Assignment of Errors.

Dated New York, N. Y., September 7, 1943.

The United States, By Paul P. Rao, Assistant Attorney General, Attorney for Appellant, 201 Varick Street, New York, N. Y.

ASSIGNMENT OF ERRORS

The United States Customs Court has erred as follows:

1. In denying defendant's motion to dismiss the protest.
2. In not dismissing the protest on the ground that it presented a nonjusticiable question.

3. In not dismissing the protest on the ground that it did not state a good cause of action.

[fol. 2] 4. In holding with respect to Section 522 (c) of the Tariff Act of 1930 as follows:

• • • Nothing in the language quoted can by any stretch of the imagination be interpreted as conferring

power upon the Secretary to accept or reject any rate, or to make any determination as to whether the rate is or is not proper. The only authority given the Secretary is to make such determination public and in this he is given discretion as to the time and extent of the publication.

5. In holding that the rule of construction permitting plural interpretation of nouns used in the statute in the singular, when such construction effectuated the legislative intent, applied in the case at bar and justified the action of the Federal Reserve Bank in certifying two rates of exchange for the Pound Sterling.

6. In holding in effect that the publication and use of two rates of exchange in the case at bar was harmonious with the legislative objective of statutes which sought to regulate the value of foreign currency in such a manner that the assessment of duties on imported merchandise would be uniform.

7. In finding in effect that the value of the merchandise in the case at bar was expressed on the invoice in depreciated currency.

8. In holding that the statutory procedure regulating the method for determining the value of foreign currency made untenable the contention of the Government that the Secretary of the Treasury had the power either to reject both rates certified by the Federal Reserve Bank in the instant case, or to determine which of the two rates was proper.

9. In holding that the power of the Secretary of the Treasury under Section 522 (c) was merely ministerial.

10. In holding as follows:

* * * It is the opinion of the court that when the Federal Reserve Bank on the date of exportation of the instant merchandise, viz, May 3, 1940, certified two buying rates for pounds sterling, one denominated "free" and the other "official" it was the duty of the Secretary, under section 522 (c), *supra*, to publish both rates.

11. In holding that the Secretary of the Treasury did not have the power, under Section 522 (c), to reject both rates which had been certified by the Federal Reserve Bank or to select the proper rate.

12. In holding that the action of the Secretary of the Treasury, in selecting one of the two rates published, was subject to judicial inquiry.

13. In not holding that the publication by the Secretary of the Treasury of the rate of Exchange of the Pound Sterling for the times relevant to the instant controversy was binding and conclusive on all parties, including the Customs Court.

[fol. 3] 14. In not holding that the reasons which prompted the Secretary to publish the rate of conversion to be used for the British Pound were not subject to judicial scrutiny.

15. In holding in effect that the court was here reviewing the action of the Collector of Customs and not the action of the Secretary of the Treasury.

16. In holding that the Secretary of the Treasury, under the circumstances in the case at bar, was compelled to publish both rates of exchange, and that the collector was empowered to select the correct rate.

17. In finding and holding that the collector should have used the "free" rate of exchange in converting the currency of the instant invoice.

18. In not overruling the protest because the plaintiff had failed to prove a *prima facie* case.

19. In not overruling the protest on the ground that it did not state a good cause of action.

20. In ~~not~~ overruling the protest on the ground that the relief which it sought had already been granted.

21. In holding as follows:

It may be noted that the stipulation herein recites that the payment in this particular case was made at the exchange rate of \$3.21. True, this rate of exchange has little bearing on the question presented; nevertheless it raises an inference that the currency of the invoice here involved was in pounds sterling which were convertible at the "free" rate.

Schedule A

Port: New York, N. Y.

Subject: Currency Value.

Decided July 30, 1943.

Importer, John Barr; Protest, 57467-K/1584; Vessel, *Britannic*; Entry No. 813191; Date of entry 5/13/40.

STATE OF NEW YORK,

City and County of New York, ss:

Louis Rosenberg, being duly sworn, deposes and says that he is over age of 21 years; that he is a Clerk in the office of the Assistant Attorney General in charge of customs cases; that on the 6th day of September 1943, deponent served the within-Petition for Review upon Barnes, Richardson & Colburn, attorneys for the importer herein, by depositing a true copy thereof, properly inclosed in a securely closed and duly franked official wrapper of the United States Department of Justice, in a letter box duly maintained by the United States Government and under the [fol. 4] care of the Post Office at New York City, addressed to said Attys. for Appellee at No. 2 Rector Street, New York City, that being the address designated by Appellees, Atty. for that purpose upon the preceding papers herein.

Louis Rosenberg.

Sworn to before me this 6th day of September, 1943.

Mary K. McQuade, Notary Public. Commission expires March 30, 1945. (Seal.)

[File endorsement omitted]

IN UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

[Title omitted]

NOTICE OF APPEARANCE—Filed September 11, 1943

Please take notice that we are retained by and do hereby appear for John Barr in the above-entitled action and demand that copies of all papers be served on us at our

office, No. 2 Rector Street, Borough of Manhattan, City, County, and State of New York.

Dated September 9, 1943.

Yours, &c., Barnes, Richardson & Colburn, Attorneys for Appellee, Office & P. O. Address, No. 2 Rector Street, Borough of Manhattan, New York 6, N. Y.

To: Hon. Paul P. Rao, Assistant Attorney General, Attorney for Appellant, 201 Varick Street, New York 14, N. Y.; Hon. Arthur B. Shelton, Clerk, United States Court of Customs and Patent Appeals.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES CUSTOMS COURT

Suit 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

CLERK'S CERTIFICATE

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following: A copy of—

1. Protest 57467-K/1584 and report of collector of customs.

2. Proceedings before the court December 17, 1941.
3. Motion to dismiss.
4. Proceedings of June 3, 1942, and testimony taken before the court September 30, 1942.
5. Stipulation of counsel.
6. Exhibits 1, 2, 3, 4, Coll. 5, 6, 7, 8, and 10, referred to in the testimony.
7. The decision in question, C. D. 801, and judgment.

The entry papers will be forwarded later.

Witness The Honorable Presiding Judge of the United States Customs Court, this 29th day of September A. D. 1943.

J. W. Dale, Clerk. (Seal.)

Conversion of Currency.

IN UNITED STATES CUSTOMS COURT

Protest No. 57467-K/1584

COLLECTOR OF CUSTOMS,

Port of New York:

Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision (including the [fol. 6] legality of all orders and findings entering into the same) assessing duty, on the entries below named. The reasons for objection are as follows:

In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (a) of the Tariff Act of 1930, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b).

We further claim that the assessment of duties and taxes made herein is illegal and void.

Vessel, Britannic; Entry No. 813191; Entered 5/13/40; Bond No. C; Liquidated 12/19/40 F.

Respectfully, H. W. Robinson & Co. John Barr.

Notify Strauss & Hedges, Attorneys, 2 Rector Street, New York City.

1584. H. W. Robinson & Co., John Barr. 813191. Rate of Exchange. Filed, Mar. 3, 1941. U. S. Customs Court. J. W. Dale, Clerk. Received Protest Section, Jan. 22, 1941. Custom House, New York. 57467-K. Decision Reviewed and Affirmed. Harry M. Durning, Collector, Per (Illegible), Feb. 25, 1941.

IN UNITED STATES CUSTOMS COURT

REPORT OF THE COLLECTOR

Memo re Protest 1584 of 1941

The merchandise covered by the cited entry (or entries) was invoiced, entered and appraised in English Pounds (Sterling). The value of such foreign currency certified to by the Sec. of the Treasury, in accordance with Sect. 522 (c), Tariff Act of 1930, was \$4.035 per pound sterling. The proclaimed value of such currency for the quarter, during which the goods were exported was, \$8.2397.* The value so proclaimed, varying by more than 5% from the value certified for the date of exportation, the latter (certified) value was used in converting the foreign exchange in liquidation, in accordance with Sect. 522, Tariff Act of 1930 and Art. 822, Customs Regulations of 1937.

The protest was filed within 60 days of liquidation.

Harry M. Durning Collector. F. M. J. Dunnie.
Pounds Sterling.

[Col. 7] IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

JOHN BARR, Plaintiff,

VS.

THE UNITED STATES, Defendant

Protest No. 57467-K

PROCEEDINGS BEFORE THE COURT

New York, N. Y.,

December 17, 1941.

Before Judge Cline, Judge Keefe

Appearances:

Strauss & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, associate counsel, for the plaintiff, by

J. Bradley Colburn, Esquire, of counsel. Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

Mr. Colburn: I ask that the appearance be noted generally of Barnes, Richardson & Colburn as associate counsel.

This protest, if the court please, is one of a very large number pending before the court. It involves the proper conversion of pounds sterling into United States dollars for the purpose of assessment and collection of tariff duties.

All of these protests allege that the Collector of Customs in converting the currency of the invoice into United States dollars for the purpose of assessment and collection of duties failed to follow the law as set forth in Section 522 (c) of the Tariff Act of 1930, and that his conversion of currency was accordingly illegal, null, and void.

The facts are clear, and I believe are well known to the United States, to the importers, and to the public generally. With this in mind, a stipulation was prepared and submitted to the United States, setting forth the known relative facts.

The United States has refused to sign that stipulation, and is about to move to dismiss this protest, on the ground this court has no jurisdiction to decide what I believe is the only question here presented, that is, whether the Collector of Customs has followed the provisions of Section 522 (c) in converting foreign currency into United States dollars.

In other words, as we view it, the Government proposes by its motion to have this court adopt as a rule of law the proposition that this court has no power or duty to review [fol. 8] any action of the Collector of Customs insofar as such action may relate to conversion of currency, whether or not facts are known or susceptible of proof which may establish such action of the collector to be in disregard of existing provisions of law.

It is not my disposition this morning to attempt to present to the court the details of the factual situation or to argue the question of law or fact that are involved in these cases.

It has been agreed between counsel, subject to the approval of the court, that the motion of the United States to dismiss this protest be filed this morning; that counsel for the defendant have 30 days from the date hereof for the purpose of filing a memorandum supporting its motion, and

that counsel for the plaintiff have 30 days thereafter to reply; that reply briefs may be filed in the discretion of the court if timely application is made therefor; and that the test case may be removed from the trial calendar of the court pending decision on the motion to dismiss, it necessarily, of course, being contemplated by counsel it would request the court to reserve decision on this motion until after receipt of the briefs.

Mr. Donohue: If the court please, I concur in the oral stipulation proposed by Mr. Colburn respecting the time for filing of briefs.

As to the motion to dismiss I do not, of course, concur in his presentation of the only issue involved in this case.

It is the contention of the Government that this case presents a question which is not justiciable; and secondarily, that the protest does not present a good cause of action. We will argue those points at length in our brief.

I ask now that our motion to dismiss the protest be filed.

Judge Cline: Motion will be filed.

Mr. Donohue: Counsel requests jointly that the case be taken from the trial calendar until the court renders a decision on the motion to dismiss.

Judge Cline: So ordered.

Mr. Colburn: And we understand the court has likewise by its ruling given the time requested for briefs in this matter.

Judge Cline: What time do you want? You will want to brief that, I believe, as soon as you can.

Mr. Donohue: We request 30 days from today for the purpose of filing our memorandum.

Mr. Colburn: And we ask 30 days thereafter to reply.

Judge Cline: Time for briefs as requested granted.

[fol. 9] IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

[Title omitted]

MOTION TO DISMISS—Filed in Open Court December 17, 1941

Paul P. Rao, Assistant Attorney General of the United States and counsel for defendant herein, moves to dismiss

the protest in the above-entitled matter on the following grounds:

(1) The issue sought to be raised by this protest is not subject to judicial review.

(2) The protest and the official papers in the jacket show on their face that they do not state a cause of action against the defendant.

Paul P. Rao, Assistant Attorney General, Attorney for the Defendant, by Joseph F. Donohue, Special Attorney.

Due and timely service of a copy of the within motion is acknowledged this 15th day of December 1941.

Barnes, Richardson & Colburn, Attorneys for the Plaintiff; J. Bradley Colburn.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

JOHN BARR, Plaintiff,

vs.

THE UNITED STATES, Defendant

Protest No. 57467-K—Oral Argument on Motion to Dismiss

Proceedings Before the Court

New York, N. Y.,

June 3, 1942.

Before Judge Cline, Judge Keefe, Judge Ekwall

Appearances:

Strauss & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, as associate counsel, for the plaintiff, by J. Bradley Colburn, Esquire, of counsel.
[fol. 10] Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

ARGUMENT ON MOTION TO DISMISS

Mr. Donohue: May it please the court, this action arose by protest against the rate of conversion used by the collector in converting the currency of the invoice.

The Government is here to argue a motion heretofore filed to dismiss the protest, on two grounds:

First, that it presents a nonjusticiable question;

Second, that the protest and the accompanying papers show on their face that no cause of action is presented.

The merchandise in controversy is woolen cloth. The paragraph under which it was classified and the rate of duty at which it was assessed are not challenged by the protest.

The single claim in the protest with which we are concerned is the allegation of the plaintiff that the collector should have converted the currency of the invoice at the buying rate of exchange, in accordance with the provisions of Section 522 (c).

The complaint in the protest reads as follows—it is quoted in page 4 of the Government's brief:

"In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (c) of the Tariff Act of 1930, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b).

"We further claim that the assessment of duties and taxes made herein is illegal and void."

For the purposes of this argument we will disregard the last claim, the last sentence in the protest. It is a general allegation which has not been pressed by the importer up to this point, and we will confine ourselves to the contentions that this protest seeks:

(1) To raise a nonjusticiable question; and

(2) To present a cause of action which is shown by the papers in the case already to have been granted.

The law governing the conversion of currency is found in Section 522 of the Tariff Act of 1930, which is set forth in page 92 of the Government's brief.

Section 522 (a) provides that the Director of the Mint shall estimate quarterly the value of foreign currencies and shall furnish such estimate to the Secretary of the Treasury, who shall proclaim the values of such currencies.

Section 522(c) provides that if no such proclamation has been made or if the rate proclaimed varies by more than 5 per cent from the buying rate, as measured on the [fol. 11] New York market, then the Federal Reserve Bank shall determine such buying rate from cable transfers, shall certify such buying rate to the Secretary of the Treasury, who shall publish it to the extent which he deems necessary.

It is not questioned by either side in this case that the proclaimed rate varies by more than 5 per centum from the buying rate, and therefore we are in agreement that the rate should be determined in accordance with the provisions of Section 522 (c).

The merchandise at bar was exported on May 3, 1940, and the buying rate under 522 (c) must be determined as of that date.

By a Treasury Decision, published as T. D. 50134, set forth in page 95 of our brief, the Secretary of the Treasury directed Collectors of Customs to use the so-called official rate of conversion.

I should say that for that date the Federal Reserve Bank had certified to the Secretary of the Treasury two rates for the British pound sterling; one was described as official; the other was described as free. The rates differed in value. The Secretary of the Treasury directed Collectors of Customs to use the official rate. The Collector of Customs, in converting the invoice in the instant case, used the official rate.

The point which the importer seeks to raise by this protest, the point which he argues in this brief, is that the other rate should have been used, the free rate.

The Government does not concede that this point is properly pleaded; but assuming for the moment that it is, we assert that the question presented by the protest is non-justiciable, because the limit of judicial inquiry is to ascertain whether Section 522 (c) has been followed; that is, whether a rate has been certified by the Federal Reserve Bank to the Secretary of the Treasury, whether the rate certified has been published, and whether the rate published has been used. In brief, compliance with the statute. If those facts appear in the papers we assert that the court will make no further judicial inquiry to ascertain the correctness of the rate.

I should say at the outset that this motion to dismiss is no endeavor on our part to be technical or to attack the mere

words of the protest. We assert that the fundamental question which it seeks to raise was determined by the Supreme Court of the United States over 60 years ago to be a question which has been reposed exclusively in the executive department of the Government and is not subject to judicial review; that neither this court nor the Supreme Court nor any court will review the action of the Secretary in ascertaining the rate of exchange; and consequently, that the question presented is not subject to judicial review.

[fol. 12] This position is supported, first, by reference to the historical background of the various statutes governing the value of foreign currency.

The first law which was passed governing the value of foreign currency was enacted by Congress in 1789, and there the values of the currency of each country were set forth. Thus it is apparent that Congress retained unto itself the right to fix the value of currency; and obviously, such legislation is no more subject to judicial review to determine its wisdom or accuracy than would be any other law.

By a subsequent amendment to the statute, however, it was provided that consular certificates could be furnished accompanying invoices—rather, this was a regulation, not an amendment. The regulation was made pursuant to an amendment. The regulation provided that consular invoices could be submitted, consular certificates could be submitted with invoices, to show a value of a foreign currency different from the value which had been fixed by statute.

That situation existed with respect to the state of the law from 1789 until 1873, and then it was provided by statute that the value of foreign coins should be estimated annually by the Director of the Mint and proclaimed by him—estimated by him and proclaimed by the Secretary of the Treasury, and that the value so estimated and proclaimed should be used in the conversion of invoices and for all custom-house purposes.

That statute was reviewed by the Supreme Court in the case of *Collector vs. Richards*.

The Director of the Mint, in his interpretation of the duty which had been conferred upon him by statute, issued two lists of the values of foreign currencies. In one he set forth the coin value in gold of the perfect coin of each foreign currency. In the other he set forth the coin value of the

standard coin in circulation. He calculated that there would be a slight diminution in value of the standard coin in circulation, because it was used in commerce and worn until a slight fraction of its weight was lost. So he furnished the Secretary of the Treasury with two lists, each showing a different value for the respective currencies than the other.

We consider this fact is worthy of the attention of the court because here, in one of the earliest cases on currency, the Director of the Mint, in performing a duty comparable to the duty of the Federal Reserve Bank here, estimating the value of coins, furnished the Secretary of the Treasury with two estimates of varying values for each coin; and the Secretary of the Treasury chose the one which was to be used in the liquidation, in the conversion of currencies in the liquidation of invoices; and the Supreme Court held that the choice made by the Secretary of the value of foreign currency was final and conclusive. It didn't review the manner in which he made his choice, nor the reasons. It stated only that the action of the Secretary in determining the value of foreign coins was final and conclusive.

The 1873 statute came before the Supreme Court in 1880, in the case of *Cramer vs. Arthur*. That case arose by protest by the importer complaining that he had been assessed too high a rate of duty because the Collector had improperly converted the currency of the invoice. The currency of the invoice was Austrian florins. The Secretary had found that silver was the standard of currency in Austria, and that the silver florin had a stated value. The Collector had accepted that value and converted accordingly. The importer claimed that gold was the standard of currency in Austria and that the value of the florin in gold differed from its value in silver and that he was entitled to have the currency of the invoice converted at the gold value.

Now, in establishing its case the Government offered two things: first, the consular certificate, showing the value of the currency; and second, the proclamation of the Secretary showing that the value proclaimed was the value used. It offered in evidence nothing more.

From the facts in the case it is apparent that the court was of the opinion that the importer's contention was intrinsically correct, that the Government had used the wrong standard in converting. Nevertheless, the court held that the finding of the Secretary as to the value of the currency

was final and conclusive; and this language is worthy of note:

"Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol, or by financial quotations in gazettes, that its valuations are inaccurate."

In other words, the proof was held by the court to be irrelevant to the case.

The court stated further—and I won't burden the court with too many quotations, but I think this is relevant:

"The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained."

Now, that is exactly the situation here. The currency has been determined by the Secretary of the Treasury, the rate [fol. 14] of conversion has been fixed, the rate of conversion fixed by the Secretary has been used.

We submit that the *Cramer* case precludes this court from further inquiry.

The statute of 1873 was covered, without material change, into the revised statutes of a later date; and in 1885 the Supreme Court considered the case of *Hadden vs. Merritt*, and I won't relate the facts in that case, because they are substantially similar to the facts in the *Cramer* case. But I would like to read from the decision, because the language there is stated as if it were written for the Government's brief in this case:

"The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon customhouse officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or

individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation."

That language says all that we say in the case at bar. It says that the matter has been reposed by statute in the executive department of the Government. It says that the value of foreign coins is to be proclaimed by the Secretary of the Treasury. It says that there shall be no judicial inquiry to correct an alleged error or mistake.

We say in the case at bar that there shall be no judicial inquiry to review the facts which the plaintiff seeks by this protest to have reviewed.

Our appellate court passed upon the same statute in the case of *Clarke vs. United States*, and of course, it is to be expected that our appellate court would follow the Supreme Court.

[fol. 15] I have discussed the case at length in the brief. To restate the facts is to restate substantially the facts in the case at bar. To restate the law as found by the appellate court is to restate the law in the *Cramer vs. Arthur* and *Hadden vs. Merritt* cases.

Now, the law as discussed in those cases continued without substantial change until 1921, when Section 403 was enacted, which is substantially similar to the statute now under consideration. Therein it was provided that in lieu of the consular certificates that the Federal Reserve Bank should publish daily findings of the buying rate of foreign

currency, should certify these rates to the Secretary of the Treasury, and the Secretary of the Treasury should publish such rates.

That statute was reenacted into the Tariff Act of 1922, and then again into the Tariff Act of 1930, and the Congressional intent of enacting the statute is important in the consideration of this case, because if Congress sought to change the fundamental procedure which had been followed since 1789, then perhaps these cases which I have just discussed would be, as the plaintiff has said, of historical interest only. But our appellate court discussed the purpose of the new statute of 1921 in the case of *Fry & Friedman vs. United States*, which is cited in page 37 of the Government's brief; and the court found there that the purpose of this new statute was to provide a more expeditious manner of determining the value of foreign currencies, the need for such expeditious determination being occasioned by the violent fluctuations in foreign currencies which followed the first World War.

Now considering that statute with the earlier statutes, it must be apparent to the court that both statutes have two purposes. One was to determine the value of the metal coins; and that value, logically enough, would be determined by the Director of the Mint, whose duty it is to know the value of metal coins and to compare the value of foreign coins with the value of United States coins.

The other purpose of the earlier statutes, as indicated by the provisos allowing for consular certificates, was to give the Secretary some information as to the values of foreign currencies when those values departed from the metal value; and naturally enough, in the early days a consular certificate was evidence of such value or, as provided by a later proviso, in 1894, any evidence which was brought to the Secretary of the Treasury showing a value of currency different from its proclaimed value would justify a reliquidation of the entry.

Now, there were two purposes embodied in the earlier statutes—to find the value of metal coins and to find the rate of exchange in currency when it differed from the metal value.

What is the purpose of the present statute?

[fol. 16] Section 522 (a) fixes the value of metal coins by the estimate of the Director of the Mint and the proclamation of the Secretary of the Treasury.

522 (c) fixes the value of rates of exchange or of currencies of exchange which differ from metal currency, by requiring the Federal Reserve Bank to certify the buying rates and requiring the Secretary of the Treasury to publish those rates. In each instance the Secretary is furnished with a fact-finding agency; in each instance the Secretary's proclamation fixes the value, and in every case where the court has considered the proclamation it has gone no further. It has inquired only to ascertain that the value was fixed in the manner prescribed by statute; that the proclamation of the Secretary showed by its form and on its face compliance with the statute. It has gone no further.

We do not assert that the Secretary of the Treasury could find a value independently of the provisions of the statute; but we do say, and probably the court is more interested in knowing the appellate court has said, that the limit of judicial inquiry is to ascertain that this proclamation, this publication by the Secretary, shows on its face that it conforms with the provisions of the statute.

I am somewhat concerned with the assertion in plaintiff's brief that our cases are not relevant, that they are of historical interest only, because they do not interpret Section 522 (c) but pertain to proclamations by the Director of the Mint and subsequent publications by the Secretary of the Treasury. But I think if this court had before it a case where two estimates were furnished to the Secretary of the Treasury and the Supreme Court held that his choice of one of those two estimates was final, that would be so closely analogous to the case at bar that no room would be left for a discussion that there was a difference in the facts. So, I go back to the first case which I discussed, the *Richards* case.

There two estimates were furnished to the Secretary of the Treasury by the Director of the Mint, and the important thing is that the Supreme Court held that the rate which the Secretary published, coming as they knew it came, from one of two estimates, that that rate was final and that it would not review the action of the Secretary to determine how he ascertained that rate. And so here. The Treasury decision publishing the rate of conversion used in the instant case shows that the Secretary had two rates of con-

version certified to him by the Federal Reserve Bank, and that he chose one of them, and his action in so doing must be held, should be held, by the court to be final and conclusive.

The cases which we have cited earlier, interpreting Section 522 (c) and its predecessor statutes are directly in point, because they involve the disposition of the identical principle of law.

[fol. 17] The importer has argued in its brief somewhat at length that there were two currencies in Great Britain at May 3, 1940, the date of exportation of the instant merchandise. One was the official pound, and the other was the free pound. I believe that in our original presentation we did not discuss this matter at all, because we had faith in one fact which we thought would not be disputed, and that is that there was only one pound sterling, and that it was the currency of Great Britain.

In *Collector vs. Richards* the court took judicial notice of that fact, and, of course, this court can judicially notice the currency of a foreign country, and if there were two currencies in Great Britain on May 3, 1940, certainly there should be some evidence of that fact; certainly some document furnished by the Secretary of the Treasury should indicate that there were two currencies in Great Britain.

The importer points to the certification by the Federal Reserve Bank. The Federal Reserve Bank described the currency which it certified as pound sterling. It did not indicate that there were two currencies. It indicated that there was one currency and that there were two rates for that currency. And so the plaintiff has changed for the purpose of its argument what we assume to be an undisputed factual premise; that is, that there was only one currency in Great Britain.

As I say, there should be some support to a fact which would, I assume, be startling to the British Government, that there were two currencies in Great Britain. But if there were, there can be no doubt about the fact that the Secretary of the Treasury must determine which is the currency of the country. That was settled in the *Klingenberg* case, which is discussed in our brief, where there were two Austrian florins in circulation; one of gold and one of silver; and the Secretary of the Treasury selected the florin which he said was the standard currency, and the court held that that is not subject to judicial review.

So, assuming the factual premise on which plaintiff's case rests, that there are two currencies, that fact does not extend the scope of judicial inquiry here, because the Secretary of the Treasury has found that the currency of Great Britain is the pound sterling and that the rate of conversion is 4.035. That rate has been used in the case at bar, and that is the end of the judicial inquiry.

We conclude this point, your Honor, with the assertion that it must be apparent to the court from the cases here cited that in the first instance Congress reserved to itself the right of determining the value of foreign coins; that thereafter it delegated that right, that duty, to executive authorities; that from time to time in the development of the nation it changed the method by which that fact should [fol. 18] be determined, but that in no instance did it indicate that the value of foreign coins was to be subject to judicial inquiry.

In every case where the Supreme Court has had occasion to pass upon the point it has held that the action of the Secretary in fixing the value of a foreign currency is not subject to judicial review. I said at the outset that was the position of the Government, that the plaintiff's protest did not state a good cause of action, because it indicated on its face that the relief which it seeks by this protest has already been granted. In making that assertion we assume, of course, that the entry and the accompanying papers are considered as part of the protest. The court has so held.

Now, the protest states:

"In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (c) of the Tariff Act of 1930."

We agree with that. The currency should be converted according to the rate provided by 522 (c).

522 (c) provides that the rate shall be the buying rate as determined by the Federal Reserve Bank, certified by that bank to the Secretary, and published by the Secretary.

There was only one rate on May 3d that was determined, certified, and published, in accordance with the provisions of Section 522 (c), and that is the rate with which the instant invoice was converted. That is the official rate. That was found by the Federal Reserve Bank, certified by it

to the Secretary, and published by the Secretary, and used by the Collector in the conversion; and the papers set forth only one rate.

There is no mention, either, in this protest or the invoice or the entry of any other rate. The rate set forth in the entry is 4.035. It is characterized as official. It is the rate used on this protest.

We concede the merit of plaintiff's allegation, but we assert that the papers show that the relief sought has already been granted. Consequently the plaintiff has not stated a good cause of action.

Now, if we assume that two rates were certified and that there is some choice as to which of those rates must be used, we must determine who makes that choice; and that question has been answered by decisions in the Supreme Court. The Secretary makes the choice. And so that choice is binding on the court; and again, the plaintiff's case states no cause of action.

But, assuming that two rates were published by the Secretary, one of those rates must be used. Who is to determine which of those rates shall be used? Obviously, the Secretary of the Treasury. The Supreme Court has so held.

[fol. 19] Assuming, however, that there were two currencies in existence on May 3rd, which fact, of course, we dispute, Section 481 of the Tariff Act provides that the invoice shall state purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of purchase, or an agreement to purchase—the kind of currency, whether gold, silver, or paper.

The invoice here states pounds. Now, if there were two pounds in circulation in Great Britain, some indication should be given as to which of the two pounds was the currency of purchase. Obviously, if an invoice were made out in francs, and there is a Belgian franc and a French franc, the Customs authorities would be interested in knowing which of the two francs was the currency of the purchase, so that the conversion could be made at the proper rate; and so the entry papers show that the importer, at least apparently, assumed that the correct currency, if there be two, was the so-called official pound, because he stated on his entry "official," and under it the rate 4.035. So if there is to be any conversion here it must be at the

currency of the invoice; and the currency of the invoice is pounds, and the rate of conversion stated by the importer, himself, on the entry is the official rate of conversion.

One more fact should be brought to the attention of the court, and then I think our presentation is complete.

The court is well acquainted with the proposition that long continued administrative practice and legislative reenactment of a statute following an administrative practice presumes legislative approval of that practice.

The present statute, as we have stated, was first enacted in 1921, and the first proclamation of the Secretary of the Treasury, pursuant to that statute, is set forth in page 73 of our brief and I won't read it in full, but this part is pertinent:

"Provided, however, That if no such value has been proclaimed, or if the value so proclaimed varies by 5 per cent or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate, as determined by the Federal Reserve Bank of New York and published by me as certified by said bank pursuant to the provisions of said section 25, as amended."

Now, when the Tariff Act of 1930 was passed the form of the proclamation was altered only slightly. From that it is apparent that since the enactment of this statute of 1921 the Secretary has ruled that the rate of conversion to be used by collectors in converting currency is the rate which is certified to him by the Federal Reserve Bank and published by him. He has set himself up as the executive authority for stating the value to be used by the Collectors of Customs.

[fol. 20] Now, assuming that there never was a judicial interpretation of a prior similar statute here, in 1921 the Secretary of the Treasury instructed collectors to take the rate, not from the Federal Reserve Bank, not from the courts, but from him.

That statute was reenacted in 1922. It was the subject of judicial inquiry since that time. It was reenacted in 1930. Certainly this court must assume and should assume that the interpretation which has been given to the statute by administrative officials, the manner in which the statute has been worked as a practical proposition, has been approved by legislative reenactment.

Judge Keefe: Can we do that without evidence of that fact?

Mr. Donohue: Without evidence of the——

Judge Keefe: Long-continued practice.

Mr. Donohue: The evidence, your Honor, is contained in matters which this court may judicially notice. The proclamation or the publication of the rates by the Secretary is in the form of Treasury decisions. Those rates were used. The court can judicially notice that those rates were used. No evidence in the strict sense of the term is necessary to establish that.

That, your Honor, concludes our presentation of the reasons for our motion to dismiss.

To summarize, the true purpose of the pleading, as set forth in plaintiff's brief, is to seek a review by this court of the action of the Secretary in publishing the rate which was used. That is not subject to judicial review. The literal wording of the pleading seeks only to have the collector convert the currency of the invoice and reliquidate in accordance with the provisions of Section 522 (c). That has been done.

Mr. Colburn: If the court please, counsel for the Government has cited a number of cases going back to substantially the tariff history of the United States, and cited many more in his brief, to support the alleged argument that this court, and no court, has power to inquire into the correctness of the action of executive or administrative officers having to do with the conversion of currency of invoices of imported merchandise.

At the outset it is rather an amazing thing that strikes me. Believe it or not, I have read all those cases, and some more besides; in every one of those cases each of the courts in turn, up to and including the Supreme Court, heard the case. They didn't stop the plaintiff at the threshold and say, "No; you can't enter this court-room." They took jurisdiction for the purpose of hearing each and every one of those cases. I suggest, whatever may be the final ruling of this court, that situation certainly is true here.

Now I repeat again that those cases are interesting primarily from their historical background. Counsel has out-[fol. 21] lined the historical sequence of statutory enactments relating to currency. I need not tell this court the statute under *under* which the case at bar arose is mark-

edly different from any of those prior laws. However, we agree in the main that those cases establish the principle that no court, once a properly constituted authority has found the conversion, the rate of exchange—whether it be the value of coin or the exchange rate—that no court can substitute its judgment for that of the fact-finding body vested with authority by the Congress. All of these cases seem to so hold.

That is not the point of the importer's case here. We make no such claim. We accept and give complete verity and authority to the finding, the certification of the sole and only body charged and invested by Congress with authority to make or determine, rather, the exchange rates of currency to be used in the assessment and collection of duties, and that is the Federal Reserve Bank.

Counsel has adverted to the alleged authority of the Secretary of the Treasury. I would like to quote briefly from what our appellate court has had to say with reference to that. It is the *Staedtler* case, reported in 25 volume, page 136. The court, by Judge Garrett, said in part:

"It will be observed from the text of section 522 of the Tariff Act of 1930 that the authority to estimate the value of foreign coin, 'as expressed in the money of account of the United States,' is conferred upon the Director of the Mint, and the only duty required of the Secretary of the Treasury is the ministerial one of proclaiming the values so 'estimated.'"

And it goes on.

I think the court makes it clear there the very limited function with which the Secretary of the Treasury has been invested by the Congress.

If the court will look at provisions of Section 522, several other important limitations are made clear. Under Section 522 (a) it is the Director of the Mint who is to find the, estimate the value of foreign coins. Such values as found by the Director of the Mint are to be proclaimed by the Secretary, and our Court of Appeals has said that is a ministerial function.

We get to Section 522 (c), and the Congress in its wisdom has invested the Federal Reserve Bank with the power and discretion to determine exchange rates in the New York market; and there *there* is the distinction which I believe is

somewhat important. Under 522 (a) the Secretary is permitted to proclaim the values of foreign coins. Section 522 (c), the court will note the careful choice of language used by Congress, when they said in the case of exchange rates, the Secretary shall make them public.

[fol. 22]. Now it seems to me a ~~rather~~ extraordinary thing to attempt to expand that limited ministerial function of the Secretary of the Treasury into an alleged grant of power to control the action of the Federal Reserve Bank.

On the date of exportation of the merchandise here involved the Federal Reserve Bank determined and certified two different things. For the purposes of this motion I believe the United States has conceded that fact; and perhaps under that theory of this case, in any event, this court may take judicial notice of it, one of those rates, the pound sterling, 4.035, and the word, official. Under that, in the actual copy of the Federal Reserve certification, are ditto marks under the words, pound sterling, repeating the words, pound sterling, 3.47, carried out to decimal-points, the word, free.

Now, if the cases starting with the year 1789, the *Collector vs. Richards, et al.*, stand for anything I believe they establish the rule certification by the properly constituted authority cannot be impeached or changed.

We say that inhibition, that stricture applies to the Secretary of the Treasury fully and to as great a degree as it applies to the importer, the collector, to this, or any other court.

Here the Federal Reserve Bank certified two things. We say the Secretary of the Treasury has deliberately suppressed one of those things—sought to suppress it. I should say, because he hasn't succeeded. We say that he has no such authority under this or any other law.

I apprehend it is wholly immaterial whether the Secretary shall have published what the Federal Reserve Bank has done. We can conceive of a case where if we adopt the theory of opposing counsel the Secretary might refuse to make public a rate at all. He here has refused to make public, under this theory, one of the rates. So conceivably, he could refuse to make public the other. Then, if I understand the argument of opposing counsel, there would be no buying rate of exchange. We must perforce take the proclaimed value.

I say that there resides in this court, and necessarily resides in this court, the power and authority to review that action and to correct it.

Of course, when I say the Secretary here had failed in his apparent desire to suppress the certification of the free rate I meant to refer to the fact that the existing Customs regulations require, Article 822 (d), that the Customs Information Exchange shall circulate among Customs officers the rates of exchange certified daily by the Federal Reserve Bank. Pursuant to that regulation the rates here in question were circulated to Customs officers by the Customs Information Exchange. So, I suggest that may be a formal publication.

I don't think it is necessary, as I said, that there be any publication whatever. The Secretary can't thereby defeat [fol. 23] the purposes of the statute. But if conceivably some form of publication is necessary it resides there.

These rates have also been published in newspapers. They are published today. You can pick up the Journal of Commerce, Wall Street Journal, or any other recognized paper; and you will see the certification by the Federal Reserve Bank, rates of exchange for the official and the free.

Now, if you look at the Treasury decisions you will note that the rate certified by the Federal Reserve Bank for the pound sterling was entered about \$3.59, \$3.60, \$3.70, day by day fluctuating up and down. If you drew a graph of it it would be a series of jagged peaks.

On March 25, 1940, as appears from the Treasury decision 50131, suddenly that graph, the line of that graph would flatten out; it became one rate. When we look at it we see it is explained as being the official or controlled rate; went into effect on March 25th. That happens to be the day—March 25, 1940—on which the Government of Great Britain put into effect the regulation by way of amendment to its existing finance regulations, known as amendment 5-b, circulated as number, statutory rule and order number 291, whereby they required that in the case of exports of 5 classes of merchandise to the United States, to wit, whiskey, furs, tin, rubber, and jute, such permit of export, such merchandise could be obtained only upon proof that such merchandise had been paid for in Great Britain with United States dollars or with the use of pounds sterling purchased at a fixed or controlled or official rate of exchange estab-

lished by the British Government. All other merchandise, including that at bar, woolen—fancy woolen goods—was not restricted, but continued to be exported to the United States under the previously existing modes of payment, to wit, purchase in the New York market by cable transfer, pounds sterling.

That is the explanation of the two rates, the two things that the Federal Reserve Bank has done, and we suggest to this court what may circulate in Great Britain and what His Excellency, Lord Halifax, the British Ambassador, may have to say on information and belief supplied to him has no relevancy or materiality to the question here; that once the Federal Reserve Bank has certified that there were two buying rates of exchange in the New York market at noon on a particular day that is final and conclusive; that that perforce establishes, and not even the august Secretary of the Treasury may question it.

There were two sorts or kinds of pounds sterling for the purposes of Section 522 (c).

Judge Ekwall: I understand there is no dispute between counsel up to that point, that there was a determination by the Federal Reserve Bank of two rates; is that correct?

Mr. Donohue: That is correct, your Honor.

[fol. 24] Judge Ekwall: In other words, that is conceded, that there was?

Mr. Donohue: It is conceded that the two rates were certified to the Secretary, yes, your Honor.

Judge Ekwall: Of course, there was only one published by the Secretary of the Treasury.

Mr. Donohue: Yes, your Honor.

Judge Ekwall: Or proclaimed; but this statement, you concede that for the sake of circumstance?

Mr. Donohue: I concede the two rates were published and described as official and free. I do not concede that there were two currencies.

Judge Ekwall: No; I understand that.

Mr. Colburn: We say that perforce, by virtue of the action of the Federal Reserve Board, there were created for the purposes of interpretation and application of Section 522 (c), two types or kinds of pounds sterling, dependent upon the character of the goods that were being exported to the United States. That was a requirement, and dealt only with the trade between the United States and the United Kingdom. What may have existed or been required within

the boundaries of the United Kingdom I suggest this court is not concerned with.

The merchandise at bar was purchased and paid for with the character or the kind of pound sterling that was bought in the New York market by cable transfer, not controlled by the British Government; it was a free pound.

It is our theory that the merchandise, accordingly, should have been converted by the Collector of Customs at the rate determined and certified by the Federal Reserve on the day of exportation of this merchandise for that sort or kind of currency.

Now, counsel has adverted to the entry in the case at bar, but seeks to make much, in a reply memorandum filed here, of the fact that on the entry in type writing there appears the figures 4.035, followed by the word, official. Of course, the fact is that has nothing to do with his entered value. He entered it in pounds and shilling. Its entered value, I believe, was 60 pounds and 9 shillings.

For the purpose purely and only of completing a calculation of the estimated duties to be deposited by the importer he converted those pounds on that invoice and entry into dollars; and he did that conversion; and the only rate that the collector would accept, the Collector of Customs required each and every importer to convert and deposit estimated duties on the basis of the official pound, rate for the official pound. The United States now seeks to take advantage of that requirement and say the importer, because of that, is now debarred from the question.

If the importer entered his merchandise under Paragraph 355, at a particular rate of duty and thereafter filed [fol. 25] protest, claiming it is under a different paragraph, I assume this court would not question his right to do so. I don't see where the fact that it would be a fact that he put this on his entry has anything whatever to do with this question.

This court has many times taken jurisdiction and decided question on all fours with that here.

We say that the Collector of Customs, whether he acted on his own behalf or pursuant to these instructions of the Secretary of the Treasury, has committed error. He has converted on the basis of the rate for a currency that was not that of the invoice at bar.

There is in existence a certification by the only authority vested by the Congress with power to determine exchange

rates, to wit, the Federal Reserve Bank, a rate for that type and kind of currency. That is all this court has to decide.

Much of what has been said, unfortunately, has gone to the merits of this case.

The question before your Honors this morning is a relatively narrow one, one that you have, I believe, acted upon many times previously. Are you going to stop, refuse to hear the facts of this case? Are you going to even throw this out of the window?

I say that the theory of the United States leads inevitably to the conclusion or the argument that this court has no jurisdiction whatever in any currency matter. Are you going to continue the practice which has existed throughout the history of the prototype statutes of that now in existence, to consider and correct an error which the collector has committed?

Mr. Donohue: May I have a few moments to reply?

Of course, we have pointed out in our brief that there are many types of currency cases which this court can consider and this court could, of course, review the action of the collector in the case at bar to determine whether or not he used the rate of conversion which he is required to use under Section 522 (c). But we contended in our presentation that the matter sought to be presented to the court by this protest is nonjusticiable, in that it involved a review of the action of the Secretary of the Treasury.

We pointed out cases which have heretofore been decided, saying that that action is not subject to judicial review.

The importer has not questioned that this protest involves a review of the action of the Secretary of the Treasury. He has indicated—

Judge Ekwall: If I understood his argument correctly he argued just the opposite. He argued that it didn't make any difference what the Secretary of the Treasury did, that the Federal Reserve Bank was the only agency of the Government that had vested in it the right to proclaim [fol. 26] these rates, and that they did that, and that whatever the Secretary of the Treasury might have done or might not have done, as I interpret his argument, would be the action of the collector. Isn't that—

Mr. Colburn: That is substantially my argument; yes, your Honor.

Judge Ekwall: The collector and the Secretary of the Treasury, as I get their argument, would be the same thing. In other words, we are not called upon to review the action of the Secretary of the Treasury; we are called upon to review the action of the Collector of Customs.

Mr. Donohue: Well, we don't question that, your Honor. That is to say, we don't question that if the Secretary's proclamation of the rate was illegal it is no defense for the Government to say that the collector followed the instructions of the Secretary. And so it is as your Honor has stated. The collector is acting under instructions from the Secretary, and the action of both must be valid or void. We agree on that point.

But then what action is being reviewed here? The rate of exchange employed.

Who furnished that rate of exchange? The Secretary of the Treasury. He instructed collectors to use it. That is set forth in the pertinent Treasury decisions.

Judge Ekwall: Well, that is just the point. We are just beating the devil around the bush here. We are getting right back to the same point.

As I understand, the whole argument is centered around whether the Federal Reserve Bank is the agency that has the right to proclaim these rates, or whether the publishing of the rates ~~or~~ of one rate by the Secretary of the Treasury is controlling upon the court.

Mr. Donohue: If that is the plaintiff's contention we are quite willing to join issue on that. If the plaintiff reads the statute to say that the Federal Reserve Bank has the attributes of the Secretary of the Treasury for the purpose of instructing Collectors of Customs what rate to use then we are quite willing to join issue on that proposition.

In other words, the statute says that the Secretary shall make public the rate to be used.

Judge Keefe: That is his sole duty, isn't it, in this matter? The Secretary of the Treasury shall make public the determination of a rate made by the Federal Reserve Bank; isn't that true, isn't that his duty?

Mr. Donohue: It is his duty.

Judge Keefe: And that is his sole duty, as I see it. [fol. 27] Mr. Donohue: Yes, your Honor. That is to say, he does not make his own investigation of the buying rates. He takes the rates certified to him.

Now, when he makes public a rate that is the rate; and if he makes public the rate in the form prescribed by statute that is the rate which is not subject to judicial review. That is what the courts have held.

Plaintiff's opening argument presents this proposition that in all of the cases which we have cited there was more than a motion to dismiss. There was a presentation of the case on the merits.

Whether or not that is so, and assuming that in most of the cases that was so, nevertheless, the court held that the particular question here presented was not subject to judicial review.

Those holdings mean something. They are a precedent which this court is obliged to observe and which this court in the proper discharge of its duties should follow. They are not merely there to indicate that because in 1874 the Supreme Court heard a case and made this finding that again this court shall hear the case only to find that the matter presented is not subject to judicial review; and in fact, our appellate court in the Clarke case—one of the cases cited in our brief—made mention of the failure of the Government to raise the question of jurisdiction. I read from 17 Court of Customs Appeals, 422:

"No question of jurisdiction was raised upon the trial before the Customs Court, and that tribunal passed upon the case and overruled the protest.

"In this court the Government for the first time raises the question of jurisdiction and insists that the action of the Secretary of the Treasury pursuant to section 25 of the Tariff Act of 1894 is not reviewable by the United States Customs Court * * *. It seems proper that the jurisdictional question should receive first attention."

The jurisdictional question was then decided.

Judge Keefe: How may the jurisdictional question be raised? Not only by a motion to dismiss which is clearly in the old practice, the demurrer, which admits the true statement of facts of the petition. Isn't that true? Can it not also be raised by an objection to the admission of testimony, which would really be to the same effect?

Mr. Donohue: Yes, your Honor; but I suggest that we should do first things first; and if this question presented in this protest is not subject to judicial review then the

court should not hear the case merely to make a finding which could be determined on motion.

The plaintiff has argued that if the Secretary refused to publish a rate then he stated that this court would have the power to correct the matter. Those were his words, as nearly as I can remember them. But this court has held, itself, in the case of *Dyer vs. United States*, quite to the [fol. 28] contrary. The court states as follows—this was an opinion by Judge Evans, if I recall correctly:

“The power of this court is limited by the statute, and nowhere in the statute do we find authority to compel the Secretary of the Treasury to proclaim a rate of conversion.”

Judge Keefe: Is that in the yuan dollar case—Mexican dollar?

Mr. Donohue: Mexican dollar; yes, your Honor.

Judge Keefe: And all the decisions you have cited were prior to that case, because that case is since I came here.

Mr. Donohue: Yes, your Honor; but that case does not raise the real question which the importer here seeks to have reviewed, and the finding which I refer to here is on another point, but it is a finding to the effect that where the Secretary has refused to publish a value this court does not consider that it has any power by statute to compel him to publish such value.

Now the importer thinks otherwise; but there is a previous holding of this court.

Judge Ekwall: Suppose, for the sake of argument, that the Federal Reserve Bank certified two rates, and the Secretary of the Treasury didn't publish either one of them, just remained inactive about the matter; and the Collector of Customs went ahead and used his own discretion, and chose the official rate, we will say, in this case, rather than the free rate. Wouldn't we have something to say about whether he—or to review his actions?

Mr. Donohue: Oh, yes, your Honor. That is to say, would you have the power to review the action of the Collector of Customs to ascertain whether or not he had used the rate provided by statute? Certainly the court would have power to review that question. But suppose the Secretary—

Judge Keefe: Isn't that the very question that is before us right today, whether we have the right and the power to hear these cases and determine that very fact?

Mr. Donohue: No, your Honor. It is conceded on the—

Judge Keefe: I disagree with you.

Mr. Donohue: That is your Honor's unquestioned prerogative. But it is conceded on the papers in this case that the rate published was the rate used by the collector.

It is conceded on the papers that—when I say conceded I mean it is unquestionable from the papers—that the rate certified was the rate published.

It is alleged that because two rates were certified and only one was published that this court can review the power of the Secretary or the act of the collector in refusing to employ the other rate.

Judge Keefe: Have you finished, gentlemen?

Mr. Donohue: Yes, your Honor. Thank you.

[fol. 29] Mr. Colburn: I have nothing more to add, your Honor.

DENIAL OF MOTION TO DISMISS

Judge Cline: The court unanimously agrees that it has jurisdiction to decide this question; to hear the matter, at least.

We deny the motion to dismiss unanimously; and we would like to have the case set down for hearing, if counsel can be ready—on the merits, I mean—this term of the court. Can you be ready to try your case?

Mr. Colburn: I can be ready, your Honor.

Mr. Donohue: Your Honor, I can not be ready.

Judge Cline: That will hold it over, of course, until next fall. This is the last term of the court when all of the members will be here to hear the case.

Mr. Donohue: I regret that that is necessary, but for one thing, we have a witness who is out of the country, whose testimony we consider important to the presentation of the case. He is in Ecuador, and he cannot be here in June. We feel reasonably certain that he will be here in October.

Judge Cline: All right.

Mr. Colburn: I think counsel has had ample time to prepare this case, your Honor. The case has been pending before this court for a long period of time. I fail to see where the court is going to be enlightened to any great extent by testimony.

Judge Ekwall: I was wondering whether possibly you couldn't agree upon stipulating that if this witness were present he would testify thus and so and possibly obviate the necessity of his being here.

Mr. Colburn: Of course, I have no present knowledge who he is or what he might testify to.

Judge Ekwall: I understand, but I am just giving you the suggestion.

Mr. Colburn: I would be glad to attempt that, but I would seriously suggest to this court that this case has been pending a sufficient length of time; before this motion was ever presented the facts relevant to it were fully discussed with counsel for the United States.

A proposed stipulation was submitted. Counsel refused to sign it, and filed this motion to dismiss. I don't feel that there is anything that can enlighten the court on this controversy that can't be supplied by public record, either by the Federal Reserve Bank or by the published Treasury decisions, or some other such record that is now available.

Mr. Donohue: Your Honor, I take it that without question we would have the right to present the case as we best saw fit. I believe that Mr. Colburn is sincere in his belief as to what is necessary for the presentation of the case, but if we differ, if we feel that evidence should be presented the court is setting the case down so that evidence may be presented, and we are not interested in delaying the case [fol. 30] merely for the sake of the delay. This is an important case. There are a great number of protests suspended pending the decision of this case, and it would serve no purpose to compel the Government to proceed before it was ready.

Mr. Colburn: May I ask the court to inquire what the witness would testify to? Perhaps pursuant to his Honor, Judge Ekwall's suggestion, it can be covered. I don't know.

Judge Keefe: Maybe you can get together on a stipulation. If you can—

Judge Cline: Are you asking for the continuance solely for the testimony of this one witness, Mr. Donohue?

Mr. Donohue: No, your Honor. I am asking for the continuance because, frankly, the case is not in proper shape for presentation as a whole.

We submitted our motion and submitted our brief in support of the motion, believing that the usual custom would be followed of giving us ample time to prepare.

Judge Ekwall: Well, I understood from your argument there wasn't any matter of fact so far as you could see to be presented. It was all a question—

Mr. Donohue: Yes, your Honor.

Judge Ekwall: Then, why do you have to have 2 or 3 months' time to present your case?

Mr. Donohue: I think perhaps we could be ready in less time than that, but the proposition is either to be ready within 2 weeks or not until the court convenes in October, and we cannot be ready in 2 weeks.

(Further discussion at this point off the record, by order of Judge Keefe.)

Judge Cline: It will go to October.

Mr. Donohue: Your Honor, I don't know whether I noted on the record an exception to your Honors' ruling.

Judge Cline: Exception to the Government.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

JOHN BARR, Plaintiff,

vs.

THE UNITED STATES, Defendant

Protest No. 57467-K

New York, N. Y., September 30, 1942.

Before Judge Cline, Judge Keefe, Judge Ekwall

APPEARANCES:

Straus & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, as associate counsel, for the plaintiff, by [fol. 31] J. Bradley Colburn, Esquire, of counsel. Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

COLLOQUY

Mr. Colburn: May it please the court, at the outset, may I informally expressed our appreciation to the court—and I am sure counsel for the Government joins me—for their consideration and courtesy in granting us this special hearing.

Judge Cline: We are very glad to do it.

Mr. Donohue: The Government joins in that

Mr. Colburn: The case before the court this morning is the same as that heard by the court in June. At that time, upon a motion by the Government to dismiss the protest, on the alleged ground that this court had no jurisdiction to hear it, briefs were filed, the case was argued before the court, and after due deliberation the motion was denied.

We are here this morning to hear this case upon its merits.

I would like, if I may, to make a short statement outlining the history of the case and the facts, at the conclusion of which I propose to present to the court a stipulation of the facts, upon which counsel have labored long over the summer and have finally gotten together.

The merchandise in this case consists of certain woolens imported from Great Britain, classified under Paragraph 1109 of the Tariff Act of 1930.

There is no dispute here, and no claim is made with respect to that classification. The sole issue sought to be raised by the protest, and which we here present to the court, is with respect to the alleged error committed by the Collector of Customs in converting the currency of the invoice, pounds sterling, into United States money, for the purpose of assessment and collection of duties, under Section 522 of the Tariff Act.

This merchandise was exported from England on May 3, 1940. On that particular day the Federal Reserve Bank, which, as this court is well aware, is the fact-finding body designated by the Congress, under Section 522 (c), to determine buying rates of exchange, found and certified to the Secretary of the Treasury two buying rates for the pound sterling; one of those rates it denoted "free" and one of them it denoted "official."

At the time, or just prior to that certification of two rates, the Federal Reserve Bank had notified the Secretary of the Treasury of its intention to do so, because always, up until

a certain time, the Federal Reserve Bank had certified only one buying rate for the pound sterling.

In its communication to the Secretary, explaining the proposed change, the Federal Reserve Bank stated that it is an outgrowth of the control instituted by the government of the United Kingdom over its currency. The Government of the United Kingdom was to require, beginning March [fol. 32] 25, 1940, that certain classes of commodities—whiskey, tin, rubber, furs, and jute (manufacture of jute I consider in the same class)—when exported from the United Kingdom to the United States could only be given an export permit when it was established to the satisfaction of the Customs officers of the United Kingdom that payment for such five classes of goods had been or would be within a prescribed period of time paid either with United States dollars or with pounds sterling that had been obtained in the United Kingdom from the Bank of England or one of the Bank of England's agents, which they call authorized dealers—and this court will probably hear that expression "authorized dealers"; they were agents of the Bank of England—at a fixed rate of exchange, a rate of exchange fixed and set by the British Treasury. It never fluctuated, was the same always. "And," said the Federal Reserve Bank, "because of that requirement of the British government with respect to these five classes of goods, beginning on the effective day of that regulation, March 25, 1940, we will begin to certify for the first time rates for the pound sterling, first, this fixed or this rate fixed by the British Treasury of which pound sterling had to be obtained in payment for these certain classes of goods, which we will call the official rate"—"official" meaning, not denoting any official action of the United States Government or any agent thereof, but "official" meaning the British official action; "and we will continue to certify as we have always previously done the rate of exchange for the pound sterling obtained by cable transfer in the New York market, which we will call the free rate."

Now, what went on after that advice by the Federal Reserve Bank we are not informed, except, as it appears from the published Treasury Decisions, the Secretary of the Treasury issued instructions to Collectors of Customs that the Federal Reserve Bank was going to certify these two things, but that he, the Secretary, would permit to be published in the Treasury Decisions only the one official rate;

and the Collectors of Customs in converting pounds sterling of any invoice into United States money would use only that rate, not for the five classes of goods that were required by the British government to be paid for in such currency but for all merchandise imported into the United States from Great Britain.

So, the Collector of Customs at New York, in the case at bar, converted the pounds sterling on the invoice at the so-called official rate.

Protest here challenges that action. It is based upon the proposition that we say the collector committed error in converting the currency of this invoice at the official rate. We say that for the purposes of Section 522 he should have used the buying rate in the New York market for cable transfer, which was, of course, the free rate.

[fol. 33] In support of that protest it is the plaintiff's position that the statute, Section 522 (c)—and there is no dispute between the parties as to the fact that the buying rate is the proper rate to be used for conversion purposes, differing whether it be the official or the free, both differ by more than 5 percent from the proclaimed value—that when the statute in Section 522 (c) designates the Federal Reserve Bank as the fact-finding body to determine a buying rate in the New York market for cable transfer, in this case of the pound sterling, that the Federal Reserve Bank, being the fact-finding body so designated by the Congress, its findings are absolutely conclusive and binding on everyone. They are binding on this importer; they are binding on the Collector of Customs; they are binding on the Secretary of the Treasury.

We say that in the case at bar the Secretary of the Treasury, by his attempted suppression of the rate of exchange called free, has violated the statute. We say that the Secretary has no such authority; that when the Congress said to the Secretary he might make public the rates determined and certified by the Federal Reserve Bank, that was a very limited ministerial function, which cannot be broadened into an alleged grant of a power to determine for himself the proper rate of exchange. We say that is what the Secretary has tried to do in this case—the Collector carrying out the Secretary's instructions has done.

So, the plaintiff claims here that the merchandise at bar was bought and paid for with pounds sterling obtained at

the free rate by cable transfer in the New York market; that for the purposes of this statute those are a type or kind of currency; that there is, there has been, proclaimed by the only fact-finding body designated by the Congress to make such determination a buying rate of exchange for that type or kind of currency; that that is the only question before this court—did the Collector commit error in not using that buying rate of exchange so certified for goods which were purchase with that type of currency?

Now, counsel have, as I stated at the outset, agreed upon a stipulation of the most of the facts which we have deemed relevant to this controversy.

We propose this morning, subject to the approval of the court, to file that stipulation, together with certain exhibits therein referred to, which exhibits we ask be marked in evidence herein; that that be received as presented. The plaintiff will then rest. Counsel for the Government, I understand, will then desire to present the testimony of several witnesses upon one or two points which I suppose he would rather state to the court.

It is understood, further, that if at the conclusion of the hearing, subject to the further approval of the court, there is any need for rebuttal of any evidence which counsel for the Government may succeed in getting into the record, [fol. 34] that if I find it necessary I may request time, and counsel for the Government will make no objection to further continuance. Is that correct?

Mr. Donohue: The agreement as to the procedure is as Mr. Colburn has stated.

OFFERS IN EVIDENCE

Mr. Colburn: I offer at this time a stipulation entered into by counsel, together with the supporting exhibits; and may I state to the court that copies of this were presented to each member of the bench, and we have made one slight change in it since that time, to do away with, in paragraph 9 of the stipulation, which refers to a T. D., published T. D. In the form as the members of the court have the stipulation, it had provided for a copy of that T. D. being attached and marked in evidence. We have agreed that that is wholly unnecessary and have stricken out the words beginning "a true copy of which is attached hereto." So that that T. D. will no longer be in evidence. That is the only change.

Mr. Donohue: Now, it was agreed between counsel that the presentation of this stipulation at this point did not constitute a waiver of the position heretofore taken by the Government, to wit, that this case presents a cause of action not subject to review by this tribunal; and therefore, while Mr. Colburn and I have agreed that the facts stated in this stipulation are facts, the Government has not agreed that these facts are relevant, and I now wish to object to the stipulation on the ground that it is irrelevant. That was our agreement.

Mr. Colburn: Yes; irrelevant because you still insist the court has no jurisdiction of the whole subject matter. Is that right?

Mr. Donohue: That is the point that I am making now; that, and only that.

We have heretofore argued that the matter presented by this protest involves a review of the action of the Secretary of the Treasury and that the executive action of the Secretary of the Treasury is not subject to judicial review.

At this point I do not wish to analyze the stipulation for the facts which it contains. I merely seek a ruling of the court to my objection to the stipulation.

I object to it on the ground that it is irrelevant, in that this court has no jurisdiction of the subject matter of the suit.

Judge Ekwall: Objection is overruled, and it will be received.

Mr. Donohue: Exception, please.

We have agreed that the exhibits attached hereto may be marked as exhibits in the case in the manner suggested by—

Mr. Colburn: It is a matter of procedure how the stipulation shall be treated, if the court please. May it be marked as an exhibit? I just want to be sure it is a part of the factual record, that is all.

Judge Ekwall: I think it will just be filed as a stipulation. [fol. 35] Mr. Colburn: And the exhibits filed with the stipulation, as a part of it?

Judge Keefe: It would have the same effect as if they were offered orally.

Mr. Colburn: Yes.

Judge Keefe: I see your point, Mr. Donohue. You desire these various exhibits marked in accordance with the stipulation; that is, one, two, or whatever they are.

Mr. Donohue: Yes, your Honor.

Judge Keefe: I think the Clerk will have to arrange that. I think it is agreeable to the court that they be arranged in sequence in accordance with the stipulation.

Mr. Colburn: Here now, arranged in that order.

Judge Keefe: Are they also marked?

Mr. Colburn: They are not marked, but they are arranged in the order in which they occur in the stipulation.

Judge Keefe: It seems to me they should be marked so that they will be referred to by numbers or letters.

Judge Ekwall: Exactly as set forth in the stipulation. The point has been raised that each exhibit should be offered seriatim, I suppose so that there will be a record of their having been received in evidence, so as to support the stipulation.

Mr. Colburn: At this time, if the court please, I offer, and ask they be marked in evidence, the following exhibits referred to in the stipulation filed with the court: Statutory Rules and Orders 1939 No. 1067, referred to in paragraph 3 of the stipulation. I ask it be marked as "Exhibit 1."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 1" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1939 No. 1251, referred to in paragraph 3 of the stipulation, I ask be received and marked as "Exhibit 2."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 2" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1939, No. 1620, referred to in paragraph 3 of the stipulation, I ask be received and marked "Exhibit 3."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 3" in Protest No. 57467-K, as of this date.)

[fol. 36] Mr. Colburn: Statutory Rules and Orders 1940, No. 291, referred to in paragraph 4 of the stipulation, I ask be received and marked as "Exhibit 4."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 4" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1940, No. 892, and No. 894, both referred to in paragraph 5 of the stipulation, I ask be received in evidence and collectively marked "Exhibit 5."

Judge Ekwall: They will be received and marked.

(The documents referred to were received in evidence and marked "Collective Exhibit 5" in Protest No. 57467-K, as of this date.)

Mr. Colburn: A copy of a letter from the Federal Reserve Bank, addressed to the Secretary of the Treasury, under date of March 19, 1940, referred to in paragraph 7 of the stipulation, I ask be received and marked "Exhibit 6."

Judge Ekwall: It will be received and marked.

(The letter referred to was received in evidence and marked "Exhibit 6" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statement by the Federal Reserve Bank of the buying rates of exchange certified to the Secretary of the Treasury, under Section 522 (c), for May 3, 1940, referred to in paragraph 8 of the stipulation, I ask be received and marked as "Exhibit 7."

Judge Ekwall: It may be received and marked.

(The document referred to was received in evidence and marked "Exhibit 7" in Protest No. 57467-K, as of this date.)

Mr. Donohue: If the court please, I have not made individual objections to these exhibits, but I take it that my objection to the stipulation as an entirety will be deemed to include and cover objections.

Judge Ekwall: Let the record show that that will be the understanding.

Mr. Colburn: Circular of the Customs Information Exchange, dated May 3, 1940, setting forth the buying rates

of exchange certificates by the Federal Reserve Bank to the Secretary of the Treasury; under Section 522 (c), referred to in paragraph 11 of the stipulation, I ask be received and marked "Exhibit 8."

Judge Ekwall: It will be received and so marked.

(The circular referred to was received in evidence and marked "Exhibit 8" in Protest No. 57467-K, as of this date.)

Mr. Colburn: The plaintiff rests.

ARGUMENT ON MOTION TO DISMISS

Mr. Donohue: The Government wishes to be heard on a motion to dismiss this protest, on the ground that the plead-[fol. 37] ings and the facts introduced show that the only question presented and the only question which can be considered under the protest is one that is not subject to judicial review.

I think it will not be disputed that if the only question presented by this protest and the only question which the court can determine under the facts in this case involves a review of a discretionary act of the Secretary of the Treasury, which act the Secretary is specifically empowered by statute to make, then this court will not review that act.

I think if one thing is settled by the cases which have heretofore been submitted in support of the Government's motion to dismiss, it is that the executive act of the Secretary in determining the value of money is not subject to judicial review.

The question which apparently is in the court's mind is whether or not the case here presented involves a review of the Secretary's action in discretionary matter or a review of the action of the Collector. If it is the Collector's action, we concede that this court has jurisdiction. If it is the Secretary's action, we submit that the cause presented is not subject to review in this or any other judicial tribunal.

The case which is presented to the court must be presented within the scope of the pleadings and the facts. Nothing else can be considered. The only facts here are those submitted in the stipulation. The stipulation may be briefly described as follows:

Paragraph 1 describes the merchandise.

Paragraph 2 states that the merchandise was purchased in Great Britain at invoice prices in pounds sterling.

Paragraphs 3, 4, and 5 incorporate by reference certain British Orders in Council.

Paragraph 6 states that up to March 25, 1940, the Federal Reserve Bank certified to the Secretary of the Treasury one buying rate for the pound sterling.

Paragraph 7 incorporates a letter written by the vice president of the Federal Reserve to the Secretary of the Treasury, stating that on and after March 25th two rates would be certified.

Paragraph 8 states that two rates were certified in the manner indicated in the letter.

Paragraph 9 gives the proclaimed rate for the quarter in question.

Paragraph 10 states that the pounds used to purchase the instant merchandise were bought at \$3.21, and that on the same day pounds were certified by the Federal Reserve Bank as having been sold on the New York market at \$3.227, which pounds were designated as free, and on the same day the Federal Reserve Bank certified pounds were sold on the New York market at \$4.035, which rate was designated as official rate.

[f6l.38] Paragraph 11 states that the two rates certified by the Federal Reserve Bank were circularized to the Customs Information Exchange.

Now, on that statement of facts and on the pleadings, which state merely that the Collector should use the rate of exchange described by Section 522 (c), issued is here joined. So there can be no question about the Collector disregarding the advice of the Secretary and using a rate which was not published.

The question is whether the Collector was correct in using the rate which was found by Federal Reserve, certified to the Secretary of the Treasury, and published by the Secretary in the manner prescribed by Section 522 (c).

It seems that the plaintiff can proceed on one of three possible theories. He must state (1) that there were two rates or two different currencies (2) that the rate used by the Collector did not exist in the New York market; or (3) that two rates existed in the New York market for one currency, and that the Secretary directed the use of a wrong rate.

Now, as to the first premise that two rates were certified and that two-currencies existed, the court can judicially notice that there is one currency in circulation in Great Britain, and that is the British pound. If that is not the fact, certainly evidence thereof should be included in plaintiff's submission of facts and there is no evidence here that there are two types or kinds of currency in circulation in the United Kingdom. That fact should be definitely established. It cannot be left to interference to an interpretation of the British Orders in Council. Either there is one currency in Great Britain or there are two.

We say that the facts in the stipulation do not change the facts which this court can judicially notice; that is, that there is one currency.

We say, moreover, that there is affirmative evidence in the stipulation establishing that there is only one currency, and that there was at all times relevant to the instant controversy only one currency in circulation in Great Britain, and that evidence is in Exhibit 6, the letter of the Federal Reserve Bank to the Secretary of the Treasury, wherein it is stated:

"In view of the foregoing, we shall, commencing Monday, March 25, 1940, certify to the Secretary of the Treasury, pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the pound sterling."

The pound sterling is one currency. Two rates were certified, not for two currencies but for one currency, and that currency is the pound sterling.

[fol. 39] Consequently, the first premise on which plaintiff could proceed to a judicial review fails for lack of factual support. The evidence here shows that there was one currency in circulation in Great Britain, and that currency was the pound sterling. It cannot be, therefore, that two rates were certified for two currencies and that the rate applicable to the wrong currency was used. That premise must be eliminated.

The second premise is that the rate used by the Collector did not exist in the New York market.

We submit that the facts as now before the court establish clearly on their face an admission by the plaintiff that the rate used by the Collector did exist in the New York market.

The importer has stated that it will not go behind the certification of the Federal Reserve Bank. The Federal Reserve Bank, stating that it acted under Section 522 (c), has certified the rate that was here used. The legal presumption arising from that is that the rate used existed in the New York market, and counsel for plaintiff has stated that all parties, including this court, are bound by that certification. Consequently, it cannot be, under the pleadings as before the court and the facts in the case, that the rate used was a nonexistent rate.

The third premise upon which plaintiff may proceed is that two rates existed in the New York market for one currency, and the Secretary directed the use of the wrong rate.

Now, if two rates existed, it is clear, and I think it has been asserted by counsel for plaintiff in his previous argument addressed to the motion, that the statute contemplates only one rate shall be used. Someone must select that rate. If it were the obligation of the Collector to select that rate, presumably the statute would require that the certification be delivered to the Collector. But the statute specifically states that the rate shall be certified to the Secretary of the Treasury, who shall publish it to the extent that he deems necessary.

The statutory procedure, therefore, does not contemplate that the rate shall be delivered to the Collector of Customs at all. It contemplates that it shall be certified to the Secretary of the Treasury and published by him.

It may be asserted that the Federal Reserve Bank is authorized to certify one rate only. That position cannot be maintained by plaintiff here, because the plaintiff has disallowed any intention to go behind the certification by the Secretary. Consequently, the certification must be accepted.

The question which this court is to determine, then, is who makes the choice—is it this court, is it the Collector of Customs, is it the importer, or it is the Secretary?

[fol. 40] The statute says that the Secretary shall publish the rate. There is no statutory authority, no judicial precedent, no case holding that the rate certified by the Federal Reserve Bank shall be selected by the Collector. The selection and determination of a rate of exchange, we have heretofore argued in our motion to dismiss, is inher-

ently an executive matter. In historical background it is a legislative matter, and the authority is as ancient as the Constitution of the United States.

Article I, Section 8, Clause 5 of the Constitution, enumerating the powers of Congress, states that Congress shall have the power "to coin money, regulate the value thereof and of foreign coin." The Constitutional source of the power to regulate the value of foreign coin, therefore, places that power in Congress. Congress has delegated it to the Secretary of the Treasury.

The rate used here is the rate published by the Secretary of the Treasury. I will not attempt to quote the opening argument of counsel for plaintiff this morning, but as I understood him, he is asserting that the Secretary of the Treasury has suppressed the buying rate which is applicable to the instant merchandise, and that the Secretary of the Treasury had no authority to suppress such rate.

There is the issue presented by plaintiff. Consequently, this court, in the last analysis, is presented with the question to review the action of the Secretary of the Treasury. If there is one thing we submit, which is settled it is that this court will not entertain a question involving a review of the discretionary action of a Cabinet officer. Consequently, the Government renews its motion to dismiss the protest, asserting as we have from the very outset, that it presents a cause of action which is not subject to judicial review.

The possible uncertainty which may have been raised at the outset when the motion was presented because the plaintiff's case was not in has now been removed. The evidence is before the court. The pleadings are before the court. Only from the evidence and the pleadings can this court determine what is the case which it is to decide. That case, we submit, involves a review of the action of the Secretary of the Treasury, and nothing else.

We, therefore, submit that the protest should be dismissed.

Mr. Colburn: Does the court desire to hear me in answer to my friend's men of straw?

Counsel has enjoyed listening to the recital. He set up quite an army of straw, which he has successfully, or it would appear has successfully, demolished. I fail to see

where trotting out this array he has yet put his finger on the issue presented by the plaintiff.

Counsel for the United States would have this court apparently believe that the Secretary of the Treasury stands out above all things and all men and all statutes as the [fol. 41] Secretary of the Treasury who has been endowed with power, irreviewable power in a case of this character. It isn't so.

I agree with one thing and one thing only my friend has said when he referred to the Constitutional ground of power residing in Congress. I don't think any one can question that. And Congress in its wisdom, in various stages of the legislation dealing with currency matters, originally said foreign coin shall be valued at so much, and they fixed it in figures in the law.

Then that was a little bit too rigid to stand, apparently, and they, some years later, provided that the Director of the Mint should find the value of foreign coins, the metal value of foreign coins in terms of the United States money.

Judge Ekwall: May I ask you to restate that first proposition there?

Mr. Colburn: I said that I agreed with counsel for the Government in his statement that the original and only possession of this power with respect to the determination of values of foreign money and currency resided in the Congress.

Judge Ekwall: Yes; right after that.

Mr. Colburn: And I said that Congress in its wisdom had originally, by statute, prescribed the value of foreign coins in terms of their metal value in figures. In other words, they said the pound sterling shall be valued at four eight six six, or whatever it is. After that they by statute said the Director of the Mint should determine the metal value of foreign coins and that that determination by the Director of the Mint should be proclaimed by the Secretary of the Treasury.

Along some time there there was also a provision which was incorporated in the revised statutes that the President might by regulation prescribe the standard for estimating the duties where merchandise was imported in a depreciated currency.

Later those several statutes were supplanted by Section 25 of the Act of 1894, which provided that the value of for-

eign coin, as expressed in money of the kind of the United States, should be estimated by the Director of the Mint, and proclaimed by the Secretary of the Treasury.

Our Court of Appeals, in the *Staedtler* case, affirming the action by this court—that case is reported in 25th volume Court of Appeals reports—has said that the function of the Secretary of the Treasury in proclaiming the values of foreign coins, as estimated by the Director of the Mint, is a purely ministerial function.

Now, along with the Act of 1894, providing for the determination by the Director of the Mint, and proclamation of, ministerial proclamation by the Secretary of the Treasury of those values, the Congress enacted into law a proviso that the Secretary of the Treasury—and it is the [fol. 42] only instance of which I am aware, from a careful study of the legislation and history, in which the Secretary had been invested with power by the Congress—that the Secretary might order reliquidation of any entry whenever satisfactory evidence had been produced to him showing that the value of foreign money in the United States currency was at least 10 per cent, more or less, than the value proclaimed, based upon the estimate of the Director of the Mint.

Now, in the Emergency Tariff Act of 1921 that statute was, so far as the determination by the Director of the Mint and the proclamation by the Secretary of the Treasury, carried forward. But, the proviso whereby Congress had given the Secretary of the Treasury direct power for the first and only time, was repealed. Congress supplanted that proviso with a provision that buying rates of exchange should be determined by the Federal Reserve Bank and certified to the Secretary of the Treasury, and not proclaimed by the Secretary of the Treasury, which our Court of Appeals said was ministerial, but made public to such extent as the Secretary might deem necessary.

I say it entirely begs this issue to say that the actual conversion of the money of an invoice was not the act of the Collector, but was the action of the Secretary of the Treasury.

I don't for one moment suppose this court with its knowledge of administrative procedure would think such a thing was possible. It is not an executive act—I think it was called an executive act of the Secretary and not subject

to review. I think Congress acted deliberately and advisedly when it repealed the provision, the proviso to the Act of 1894, whereby they invested the Secretary of the Treasury with direct authority to make findings respecting the value of foreign currency and enacted in its stead a provision giving to the Federal Reserve Bank such, the authority to determine foreign exchange rates, and they gave that to the Federal Reserve Bank within rather well-defined limits. They set forth in the statute what they meant when they said buying rates of exchange.

Now I think it amounts to effrontery to say that the limited authorization given to the Secretary of the Treasury to make that determination public amounts to an executive act of a Cabinet officer, which this court dare not inquire into.

In the previous argument of this case the question was raised if there had been only one buying rate certified by the Federal Reserve Bank the Secretary of the Treasury chose not to make that public, and the Collector then converted on the proclaimed rate for the currency.

I suggested to this court that that would be an instance where I think everyone would agree it was an utter abuse [fol. 43] of power and necessarily reviewable by this tribunal. If that be so I say that it amounts to the same thing when there are two rates, and in the final analysis it matters not a great deal whether there are rates for two different kinds of currency or there are two rates which serve or must be used for different things. In the legal analysis I think they are the same. Where there are two of those things found by the Federal Reserve Bank and the Secretary elects not to make public, at least not to publish in the Treasury Decisions one of those rates and then says, "Oh, you can't do anything about it, you must take only the other rate"; there is no such statutory authority vested in the Secretary.

Now this question of plaintiff not having made a case—also, if I may, before leaving the other point, of course, it has been held directly by this court and by the Court of Customs Appeals, in one case at least, the *Parkhurst* case, in 12th volume of Court of Appeals, the court stated in part:

"To preserve the importer's right of protest, therefore, liquidations ordered by the Secretary must be regarded as

decisions of the collector. To hold otherwise would leave the importer remediless against every reliquidation ordered by the Secretary. Reliquidations made by the collector on orders by the Secretary are collectors' decisions; and such liquidations, like any other liquidation made by the collector, may be questioned by protest."

So, even if my friend is right this court has said that they are considered to be actions of the Collector, and necessarily reviewable in this tribunal.

Now, with regard to the plaintiff having failed to make out a case, I don't propose to make any extended statement on this. The court is, I am sure, already familiar with the facts set forth in the stipulation and in the supporting exhibits which have been offered this morning.

Briefly adverting to them, the first three Orders in Council are something that the Government desired to put before this court. In my view they don't affect the situation at all. They relate to some internal control of the economy in Great Britain. If they are material they are material only insofar as by one provision of such regulations they show that pound sterling in the United Kingdom had to be purchased when conversion was made of foreign currency at a rate fixed by the British Treasury. There was no longer any free and open market in the United Kingdom.

Of course, this court has said that in the consideration of our statutes the administrative construction and enforcement of the laws of the United States, those charged [fol. 44] with the duty of such administrative construction and enforcement must be guided by the laws of the United States, rather than by the statutes of a foreign country. That is in T. D. 47931, the *Amalgamated Textile* case.

Right there I pause to say that, of course, the statute, Section 522 (c), doesn't say the value of the British pound in the United Kingdom. When it talks about a buying rate of exchange Congress said "in the New York market for cable transfer."

The stipulation says that the merchandise at bar was paid for with pounds sterling purchased in the New York market for cable transfer. If pounds certified by the Federal Reserve Bank as that bank has said in its letter and as is shown by these other regulations, could only be ob-

tained in the United Kingdom and at a fixed rate, to wit, four naught three five, and if the merchandise at bar was bought and paid for with pounds sterling purchased in the New York market for cable transfer, and not at four naught three five but at three two one, I submit it is an irresistible conclusion to be drawn they are not the kind of pounds called official that the British regulations talk about and the Federal Reserve Bank certified under the rate for an official pound.

Those regulations—first let me say that another paragraph here dealing with the regulation that became effective on March 25th, that regulation of the British Government is material here only insofar as it throws light upon what the Federal Reserve Bank was doing when it for the first time, so far as I know, in the history certified two rates for the British pound sterling.

The Federal Reserve Bank in its letter refers to certain regulations of the British Government going into effect on March 25th and requiring payment for certain commodities by a certain kind of pound. "Therefore," says the Federal Reserve Bank, "beginning on the effective date of that regulation we will certify rates for both those things: one official and one free."

It is an interesting thing if there are two rates for one and the same kind of currency one would suppose that there would only be necessity for continuing to certify them, so long as they were different or so long as they had some different application. I don't suppose the court would indulge a presumption that the Federal Reserve Bank does a vain and useless thing.

Today, as this court may, I suppose, judicially notice, on the authorities presented by counsel for the Government, the free pound is four naught three five and the official pound is four naught three five, and that statement of facts has obtained for some time long last past.

If they were one and the same thing, why do that? I submit that the only thing this court can find on the state [fol. 45] of facts here presented is that this official pound, whether you call it an official rate for the pound sterling, and when you got back to England if you bought one at four naught three five and you bought one at three four seven, and here in New York, in the United States, one was called official and one was called free, you went back to

England and when you got there—even there, though, you couldn't use it for the same purpose. I was about to say they had the same value, but they don't, because when you get back to England with those pounds the one that you paid for at the free rate at the time of this case you couldn't use if you wanted to buy whiskey, tin, rubber, furs, or jute. That was the pound you used, however, when you wanted to buy woolens, and it was the pound that was used when this importer bought woolens.

So I say that what may be true in the United Kingdom I don't think this court is particularly concerned with, except and only as it may shed light upon what the Federal Reserve Bank meant when it certified these two things.

The fact, if it be a fact, that there was in the United Kingdom only one pound sterling is wholly immaterial, in our view, because Congress said, in Section 522, "we will judge foreign currency by what is done in the New York market for cable transfer"; and if the Federal Reserve Bank in seeking the value of foreign currency in the New York market for cable transfer found two things in so far as Great Britain was concerned—found one thing they called official and found another thing they call free—it is our basis of our case that those two things had different uses; the official pound used for the exportation payment for whiskey, tin, rubber, furs and jute exported from Great Britain to the United States, the free pound for all other merchandise exported to the United States.

The merchandise at bar being of the class of the "all other merchandise" was improperly converted on the basis of the currency in which it was paid; and that is what we ask this court to hold.

DENIAL OF MOTION TO DISMISS

Judge Ekwall: The motion to dismiss will be denied.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception allowed.

Mr. Donohue: I wish to state at the outset, if the court please, that in presenting our testimony supporting our case we do not, of course, waive the position that we have heretofore taken. We still insist that the question presented is not subject to judicial review. We present the evidence only because our motion has been overruled.

When we presented briefs supporting our first motion we incorporated a photostatic copy of a letter written by the Ambassador of Great Britain to the Secretary of State of the United States, together with photostatic copies of certifications from the Secretary of State to the Secretary of the Treasury, and an original certification from the Secretary of the Treasury stating that these were copies of letters on file in the State Department.

Of course, the Ambassador from Great Britain is not subject to subpoena. The record which I have here is a record taken from the State Department and the Treasury Department. I believe that the matter is subject to judicial notice. In order to remove any doubt on the matter, however, I offer in evidence the letter from Lord Halifax to the Secretary of State, together with the certification showing that it is a true and correct copy of the letter.

Mr. Colburn: Objected to, of course. In the first place, I think it is wholly incompetent and immaterial. I think it constitutes a first effort to go behind the certification of rates by the Federal Reserve Bank. I think it is palpably hearsay. It is an incomplete record.

I will take up the first ground. When the motion to dismiss this case was first presented to this court the United States filed a voluminous printed brief, citing many, many cases in support of its alleged support of its motion. I stated at the argument of that motion, and I restate now, that those cases are informative and interesting to this court only insofar as they establish the principle that a determination of the rates of exchange or the values of currency by the properly designated fact-finding tribunal designated by Congress is final and conclusive on everyone, and not subject to review.

I say that you draw a curtain, Congress draws a curtain behind that, and this court nor no other tribunal nor no other Government officer may challenge or go behind that finding.

I will cite the case of *Cramer vs. Arthur*, and I will read from the brief of the Government, page 13, where an abstract from that case from the Supreme Court's opinion states:

"That valuation"—meaning a finding of the value of the currency—"so long as it remained unchanged, was bind-

ing on the collector and on importers,—just as binding as if it had been in a permanent statute, like the statute of 1846, for example. Parties”—

and I can't ~~deny~~ pause to interpolate that that includes the Collector, Secretary, or any other Government officer, as well as the importer—

“Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol, or by financial quotations in gazettes, that its valuations are inaccurate.”

I submit that I might cite numerous other instances of the same tone.

[fol. 47] I submit that the offer of this alleged correspondence between several Government departments and the Ambassador of Great Britain is an effort to go behind the finding, the determination of these rates of exchange by the Federal Reserve Bank; and I submit that the finding of such rates by ^{the} Federal Reserve Bank is entitled to all of the sanctity that any determination of the Director of the Mint has been accorded in the long line of decisions by the Supreme Court and this court and the Court of Appeals, with which you are familiar.

Now, that is the main, the basis of my main objection to these papers.

I say, in the second place, they are incompetent, as I say that the Ambassador of Great Britain is not qualified to give any evidence to this court as to what the buying rate of exchange in the New York market for cable transfer for the pound sterling was on May 3, 1940. If anybody was competent, if evidence of this character is competent at all I submit it could only be presented to this court through someone who had actual knowledge of this situation; not through a diplomatic representative of a foreign country.

In the third place I submit this alleged file of papers is incomplete. It consists of a communication after this case had been presented to this court, incidentally, and apparently sought for the purpose of getting a statement to present by means of a letter, rather than by person, to this court, on one of the issues before it, a letter from

the Acting Secretary of the Treasury, the Secretary of State, an acknowledgment of that letter, and then a transmittal of an alleged communication from the Ambassador of Great Britain. There is here no copy of a letter addressed to the Ambassador of Great Britain to which his communication seemed to have been in answer.

I submit on all of those grounds or any one of them these papers are incompetent, and they should not be admitted in evidence.

Mr. Donohue: Does the court care to hear me in reply?

Judge Ekwall: Yes.

Mr. Donohue: I submit, your Honors, we have come to a harmonious understanding of the law but a confusion of the issue when Mr. Colburn quotes the Government's brief in support of his objection to an offer.

I am here willing to agree that the rate which was certified by the Federal Reserve in this case and published by the Secretary of the Treasury and used in the liquidation is the correct rate. So it cannot be I, or the Government, rather, who is going behind the certification of the Federal Reserve. But if that rate is being challenged I submit it is the importer who is going behind the certification of the Federal Reserve, and since the issue is here being [fol. 48] presented we are called upon to support the action which was taken by the Collector, even though we submit it is not subject to judicial review.

So, it becomes important to determine whether or not the rate used in this case was the correct rate, and one of the things that must be determined is whether there was one currency in Great Britain or two, and I submit that the Ambassador from Great Britain is an authority on that subject. He is not subject to subpoena by this court, and a statement from the Ambassador relating to the subject of one or two currencies is relevant to the issue which this court is now hearing.

Judge Ekwall: The objection to the admission of the proposed exhibit will be sustained.

Mr. Donohue: Exception, please.

I will call Mr. Foster.

Judge Ekwall: Is there any dispute on the question of whether there was more than one pound there, one currency?

Mr. Colburn: Well, let me say, your Honor, there can be no dispute to the fact of what the Federal Reserve Bank

certified, because that has been stipulated by the parties.

Judge Ekwall: Of two rates?

Mr. Colburn: Of two rates.

Judge Ekwall: But isn't it your position it is two rates of the same currency?

Mr. Colburn: This is the position, my position on that is simply this, that in the first place I say that that makes the court, being bound by the determination by the Federal Reserve Bank, not being able to go behind that determination of value, as the courts have held many times, that that must necessarily mean that the Federal Reserve Bank found, first, there were for the purposes of exports to the United States two different types or kinds of pounds sterling, yet they had different uses; one, the official one had to be used for the payment of export of five certain commodities—whiskey, tin, rubber, furs and jute; the other one, the free, could be used for everything else, and was not controlled at all by the British Government.

Further in support of that I say that if that be not true—that is my first premise, your Honor—I say even if there be any legal contemplation of two rates for the one, only one currency, nevertheless full force and effect must be given to the action of the Federal Reserve Bank in certifying those two things; and the proof we have presented to the court this morning shows that the pound purchased at the one rate was used for certain things, and the pound purchased at the other rate was used for certain different things, that our merchandise at bar was purchased with the pound certified as free, and we say that is the rate should be used here.

[fol. 49] Mr. Donohue: Now, your Honors, I resubmit my offer, counsel for the plaintiff having removed any question which may have existed as to the premises on which he is proceeding.

It has been clearly stated, as I understand counsel, that one of the premises on which he is proceeding is that there were two types or kinds of currencies in circulation and in effect in the United Kingdom.

Mr. Colburn: That isn't so.

Mr. Donohue: Well, then I will defer and be corrected, because I understand counsel to say that one of the premises on which he was proceeding was that there were two types or kinds of currency.

Mr. Colburn: But not in the United Kingdom. I purposely did not say that. I said at the outset of my statement that we drew a veil behind the finding of the Federal Reserve Bank, and that was final and conclusive under the cases cited by the Government; and I adopt that line of authority and am bound by it; and I say that the Federal Reserve Bank did certify two things; and I say that when you read that action in conjunction with the statute then you are led to one of two conclusions:

First, I submit, you are led to the conclusion that the Federal Reserve Bank's action results in there being for the purposes of construction and application, under Section 522, two types or kinds of pounds sterling.

There were two things that were used for different purposes, alternatively.

Judge Ekwall: Isn't it a fact that there was one pound sterling but two different rates for the pound sterling?

Mr. Colburn: That is one possible inference, your Honor, but they had different purposes, different uses, and I say that if that be true then they both must be given full force and effect.

Now, it is like, your Honors will recall the case you have had with respect to the Mexican and yuan dollar, I believe it was the Bracher case. There, in China, they were exchangeable dollar for dollar, but when they got here you had different certifications by the Federal Reserve Bank, and this court had directly and passed upon the question directly which of those certifications should have been used by the Collector.

We believe that it is wholly immaterial whether you consider this a free pound and an official pound, and if you get back to England you can use them indiscriminately, if they be the same or they are the same piece of paper. We are not concerned with that. I don't believe this court can inquire into that situation. But you are confronted here with what the Federal Reserve Bank did.

Here is the statute says a buying rate for a currency. Now the Federal Reserve Bank has said pound sterling [fol. 50] free, pound sterling official. Now our position is, your Honors may construe that as being for the purposes of construction of our laws, and that is all we, of course, are concerned with, that there were created by that action of the Federal Reserve Bank two types or kinds of cur-

rency, or you can say, if you disagree with that legal conclusion, there are two rates for the one thing, but each of those rates has vitality, each of those rates has a use and a purpose, and it was meant that they would—official for the payment of certain things; the free for the payment of certain others. In other words, you consider them in the character of in rem things. Each one was tied up with a specific class of merchandise. And then you have the only determination, what is the particular merchandise at bar; which rate is associated with it? But in either contemplation I submit that anything behind that as to the condition in Great Britain is wholly irrelevant.

Judge Ekwall: In other words, let me ask you this: If this had been a shipment of rubber you wouldn't be here?

Mr. Colburn: That is right, your Honor, on my theory.

Judge Ekwall: You do contend that the proper rate was used for rubber, tin, or furs or jute, or whatever the other—

Mr. Colburn: Yes, your Honor.

Judge Ekwall: But this being woolen they didn't use the correct rate?

Mr. Colburn: Yes; and that the Secretary of the Treasury or Collector has no more right to disregard the one rate than we have to disregard the other.

Mr. Donohue: Now, if the court please, whether counsel for the plaintiff asserts that there were two types or kinds of pounds in circulation in Great Britain or whether he asserts that there were two types or kinds of pounds in circulation and leaves the place of the circulation to our imagination I submit is wholly immaterial. Pounds sterling circulate in Great Britain and not elsewhere.

Here cable transfers are purchased, and the statute defines the rate to be used in the conversion, in Section 522 (c), by saying:

"For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted."

So the procedure is to buy a cable transfer in the United States, payable in the country where the pound circulates. That is where the cable transfer goes.

Now, one of the facts that is relevant here in disputing one of counsel's premises is that there was one pound in circulation in the United Kingdom. That is where the

pound circulates. Now counsel can assert the proposition [fol. 51] half way, and stop as to the place of circulation, but we must establish, if this court is to hear the case, we must establish as our evidence that there was only one pound in circulation in the United Kingdom; and that letter is certainly evidence on that point, and in view of the position which counsel has now stated I resubmit the documents, and offer them in evidence again.

Judge Keefe: Do you contend, Mr. Donohue, that you could admit letters in evidence in a case of this character simply because they were written by a public officer?

Mr. Donohue: No, your Honor. I wouldn't make such an assertion with respect to all—

Judge Keefe: Isn't that what you are trying to do?

Mr. Donohue: No, your Honor. The letter is written by the Ambassador from Great Britain. He is not subject to subpoena. The letter here—

Judge Keefe: Can you produce some law that where a man is not subject to subpoena that we can accept a letter written by him as testimony in a case?

Mr. Donohue: I think I can produce authority for the proposition that certified copies of the files of the State Department and files of the Department of the Treasury are admissible in evidence, and I have here certified copies of those files, and among the documents certified is a letter from the Ambassador from Great Britain.

Now, that letter is admissible because it is from the files of the State Department and because the writer of the letter, not being subject to subpoena, the letter itself is the best evidence available.

Judge Cline: You maintain that the Ambassador is the only person who has knowledge of the facts you seek to prove?

Mr. Donohue: No, your Honor. I have a witness here. But I maintain that the statement of the Ambassador in this form is relevant.

Judge Ekwall: The objection will be sustained to the offer.

Mr. Donohue: I note an exception to the court's ruling.

Judge Ekwall: Exception.

Mr. Donohue: And ask that the documents offered, which are here attached to the supplementary brief, be marked collective exhibit next in number for identification.

Judge Ekwall: They will be so marked.

(The documents referred to were marked "Defendant's Collective Exhibit 9" for Identification in Protest No. 57467-K, as of this date.)

Mr. Donohue: I will call Mr. Foster.

Mr. Foster: Your Honor, I am instructed to make a statement by my government that I attend by express permission of the Secretary of the State, out of courtesy to the court.

[fol. 52] JOHN GALWAY FOSTER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: And your address, please?

The Witness: British Embassy, Washington, D. C.

Direct examination.

By Mr. Donohue:

Q. Mr. Foster, what is your present position?

A. I am legal adviser and first secretary to the British Embassy, at Washington.

Q. Do you come here at the request of the Attorney General, and voluntarily?

A. I do.

Q. And with the permission of your own government?

A. Yes; with the express permission of the Secretary of State.

Q. How long have you held your present position?

A. Since the beginning of September 1939.

Q. Are you a member of the bar of Great Britain?

A. I am.

Q. When were you called to the bar?

A. Somewhere between 1927 or '28, I can't remember which.

Q. What experience have you had in practicing your profession and instructing in your profession in Great Britain?

A. Well, I practiced from the time I was admitted in what we call a general common law practice, and I was lecturer at London University and Oxford University. I used to examine for the bar examinations in England, and

also used to lecture to the other bonds of our profession, the solicitors and law society.

Q. In what university did you lecture?

A. Oxford University and London University, but the major part of my work was in practice.

Q. And in your present position are you called upon to advise on legal matters and to interpret laws and statutes?

A. Yes; I am.

Q. To what extent?

A. Well, that constitutes, I suppose, about two-thirds of my work. It differs at different times. I am consulted as the work arises in other departments.

Q. And in your present position have you kept yourself informed on the monetary situation in existence in Great Britain?

A. I have; yes.

Q. Is that part of your official duties?

A. It is, in order to keep myself acquainted, in order to be consulted. It is not my duty to acquaint myself with every statutory rule and regulation. It would be impossible, in fact.

Q. I refer you to Exhibits 1 to 5 in the case at bar, and ask you whether you have heretofore examined copies of those exhibits at my request in Washington, in the office of the general counsel of the Treasury Department?

A. That is so.

[fol. 53] Q. And have you examined them to the point where you are familiar with their contents?

A. Generally familiar; yes.

Q. Since September 3, 1939 have you had occasion to consult with importers and exporters with relation to questions involving importations and exportations of merchandise?

A. Yes; I have.

Q. Now I refer you to general order 291, among the exhibits—which is Exhibit 4 in the case at bar—particularly to that part of Exhibit 4 which sets forth a list of commodities.

A. Yes.

Q. And I ask you concerning that exhibit whether its effect is to restrict the sale for exportation of the articles named there so that they cannot be purchased for exporta-

tion with the use of pounds purchased at the so-called free rate?

Mr. Colburn: That is objected to. I don't believe this witness is competent to answer that question.

Judge Ekwall: Objection overruled.

Mr. Colburn: Exception.

The Witness: Could you put your question again?

Mr. Donohue: Will you read the question?

(The question was read by the reporter.)

Judge Ekwall: Just a minute before he answers. Was it the effect or the purpose?

Judge Keefe: The effect or the purpose, that is the point, Mr. Donohue.

Mr. Donohue: I think I said the effect, your Honor. I am asking him to—

Judge Cline: Just a minute. Read the question.

(The question was again read by the reporter.)

Judge Ekwall: He may answer that question.

A. That is so.

By Mr. Donohue:

Q. Referring to Exhibits 1 to 5, I ask you whether they do actually or in effect create two types or kinds of pounds sterling in the United Kingdom for the period between September 1939 and June 1940?

Mr. Colburn: That is objected to. That is an effort to go behind and challenge the certification of two things by the Federal Reserve Bank, and as such is wholly incompetent, also, the very essence of the case before this court.

Judge Ekwall: Objection to this question will be sustained.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that the effect of the British Orders in Council, designated here in [fol. 54] evidence as Exhibits 1 to 5, inclusive, did not create more than one type or kind of pound sterling in the United Kingdom for the period between September 1939 and June 1940.

Judge Ekwall: If you can ask the correct question, not the effect but the direct question as to whether there was one or more pounds sterling—

Mr. Donohue: That is the next question, your Honor.

By Mr. Donohue:

Q. During the period from September 3, 1939, to the end of June 1940, was there one or more than one type or kind of pound sterling in circulation and in effect in the United Kingdom?

Mr. Colburn: That is objected to as wholly immaterial and incompetent. Again, it is an effort to go behind and question what the Federal Reserve Bank has certified.

Mr. Donohue: May it please the court, it is apparent to me that every question which I will ask from now on which tends to adduce substantive evidence is going to be objected to on the ground that I am seeking to go behind the certification of the Federal Reserve Bank. I think it important that that point be cleared up.

I have stated, and I will restate, that we do not attempt to go behind the certification of the Federal Reserve Bank. We are here to say that that certificate was correct, that the Secretary's action in taking a rate certified was correct; that the action of the Collector in liquidating at the rate certified and published by the Secretary was correct.

We have said that for that reason this matter does not present a justiciable question, and it seems to me that the effect of counsel's objection is to sustain our position in that point.

Nevertheless, counsel for the plaintiff has submitted a case, the effect of which is to claim that the rate used is not the correct rate. Now, that rate was certified, so there is only one other alternative. The plaintiff claims that the other rate should have been used, although the protest doesn't state that specifically.

Now, if the other rate is claimed to be the correct rate, then this court is placing itself in a position where it must consider and determine which of the two rates is correct.

Judge Cline: For this merchandise in this case?

Mr. Donohue: Yes, your Honor; that is with respect to this particular importation.

Now, if that is so, it is part of our case to show that the rate certified here and used in this liquidation is the cor-

rect rate; and we are seeking to remove by factual evidence [fol. 55] one of the contentions which plaintiff is here asserting, to wit, that there were two types or kinds of pounds sterling.

Now, one of the places where pounds sterling circulate is the United Kingdom. Here is an official of the British government, who is an expert on that point, and he can testify to a point which we do not consider in dispute but which seems to be in dispute on the issue that is here presented.

I submit the question goes to the very heart of the case which is framed by plaintiff's pleadings.

Mr. Colburn: And if the court please, counsel repeats he is not attacking the certification by the Federal Reserve Bank, and yet he would seek to adduce through this witness and perhaps others, facts to establish that there is only one kind of a pound. Therefore, when the Federal Reserve Bank said "free" no force or effect can be given to that.

Now, if that isn't attacking directly or indirectly the certification of the Federal Reserve Bank I don't know what an attack means.

It seems to me he is trying to go around through the back door and do what this court and many other courts have said many times can't be done through the front door.

Now I would like to offer a second ground to my objection, and that is that in any event, testimony along this line is wholly immaterial. This court is going to decide this question, I submit, on the basis of an interpretation of our laws and our regulations. The situation in Great Britain is wholly immaterial.

As I pointed out, you might have a Mexican dollar and a yuan dollar that were exchangeable dollar for dollar in China, and yet this court has given effect to certifications of those two different things.

Here, also, I don't care, it is wholly immaterial whether in the United Kingdom something, a pound purchased at the free rate, not the official rate, were exchangeable pound for pound. I don't believe that was so, but if it were so, it is wholly immaterial.

This court is faced with the necessity of construing Section 522 (c) of the Tariff Act of 1930 in the light of the action of the Federal Reserve Bank in certifying two things,

and in the light, further, of how this merchandise at bar was bought and paid for, and that is all it is concerned with; and I submit all the rest of this is wholly incompetent and immaterial.

Judge Ekwall: Will you read the question?

(Read by reporter.)

[fol. 56] Q. "During the period from September 3, 1939 to the end of June 1940, was there one or more than one type or kind of pound sterling in circulation and in effect in the United Kingdom?"

Judge Ekwall: Objection will be overruled. He may answer.

Mr. Colburn: Exception, please.

A. There was one type pound sterling.

By Mr. Donohue:

Q. Are you acquainted, Mr. Foster, with the procedure which was in effect after March 25, 1940, by which there were purchases of pound sterling at the so-called free rate and pound sterling at the so-called official rate?

A. Yes; I am.

Q. Was there any difference in Great Britain in the uses and characteristics of pounds purchased at the official rate and pounds purchased at the free rate?

A. Well, it depends whether physically or legally. The regulation says that a pound purchased at the free rate could not be used legally for purchases of the goods,

Judge Cline: Certain—

The Witness: Yes; that is what this regulation says—payment for the goods is being made in one of the currencies or in pounds purchased at the official rate.

By Mr. Donohue:

Q. Now, Mr. Foster, was the restriction on the purchase of the goods or was the restriction on the exportation?

A. On the exportation, I should say.

Q. In other words—

A. Payment for the exportation. The restriction was on the payment.

Q. Could whiskey be purchased in the United Kingdom with pounds acquired at the free rate?

— I don't know that.

Q. Is there anything in the regulation 291 which restricts the purchase of whiskey in the United Kingdom?

A. No; no.

Q. Is there any other regulation in effect?

A. Not that I know of. All I know, the regulation says that payment must be made in one of two monies.

Q. Well, is it necessary that payment be made in pounds purchased at the official rate when the transaction is internal?

Mr. Colburn: That is objected to. We are not interested with the internal transactions. We are interested only with exports to the United States, if the court please.

Mr. Donohue: I am trying to establish whether there is one or two currencies in circulation. I submit everything [fol. 57] that tends to show the distinction or the lack of distinction between pounds purchased at the free and pounds purchased at the official rate is relevant to the question. I don't know what other facts can aid this court in its determination.

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception, please.

By Mr. Donohue:

Q. Was there any difference between the physical characteristics of pounds purchased at the free and pounds purchased at the official rate?

A. No.

Q. Was there any difference as to their use and circulation in the United Kingdom?

Mr. Colburn: That is the same question over again. Objection.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception. I offer to prove by this witness that there was no distinction between the use of pounds purchased at the free rate and the use of pounds purchased at the official rate in the United Kingdom.

By Mr. Donohue:

Q. Referring to British Order in Council No. 291, in your opinion as a member of the bar of Great Britain does that order operate to create a distinction between the use of

pounds purchased at the free rate and pounds purchased at the official rate in the United Kingdom?

Mr. Colburn: Insofar as the purchase of those goods are concerned?

Mr. Donohue: The question is as I have stated.

Mr. Colburn: I object to it in its present form. If he confines it to the scope of that regulation I won't object, but I do in its present form. To the merchandise that is covered by that regulation I have no objection, but as broad as it is I must object.

Judge Cline: Let's have the question read.

(The question was read by the reporter.)

Judge Cline: Do you limit it to the commodities specified in 291? Will you limit your question?

Mr. Donohue: I think I would have to reframe the question, your Honor. The question is now directed to the use of the pound—

Judge Ekwall: It is a general question.

Mr. Donohue: First, I respectfully submit that the question is proper as presented.

Judge Ekwall: Objection will be sustained.

[fol. 58] Mr. Donohue: Exception, please. I offer to prove that in the opinion of this witness the British Order in Council No. 291 did not create any distinction in the use of pound sterling purchased at the free rate and pound sterling purchased at the official rate in the United Kingdom.

Judge Keefe: I think he has testified to that, Mr. Donohue, outside of the order, in answer to one of your questions. I think that is quite relevant.

Mr. Donohue: Then I will ask the question, your Honor:

By Mr. Donohue:

Q: In your opinion does British Order in Council No. 291, Exhibit 4 in this case, operate to create any distinction between the use of pounds sterling purchased at the free rate and pounds sterling purchased at the official rate in the United Kingdom?

Mr. Colburn: I object to that. It is the same question over again.

Judge Ekwall: Objection will be sustained again.

Mr. Donohue: Exception, please.

By Mr. Donohue:

Q. Were pounds sterling purchased at the free rate and pounds sterling purchased at the official rate the same currency or were they different currencies in Great Britain?

Mr. Colburn: Objected to.

Judge Ekwall: Objection will be overruled.

A. No; the same currency.

Mr. Donohue: That is all, Mr. Foster.

Mr. Colburn: No questions.

(Witness excused.)

Mr. Donohue: Mr. Kennedy!

SIDNEY J. KENNEDY, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: What is your address, please?

The Witness: 29 East 11th Street, New York City.

Direct examination.

By Mr. Donohue:

Q. Mr. Kennedy, what is your present position?

A. My title is Treasury Representative in the United States Customs Service.

Q. Where are you now assigned?

A. I am assigned in charge of the investigative unit of the foreign funds control, 253 Broadway, New York City.

Q. How long have you held that position?

A. I have been there about a year and a half.

[fol. 59] Q. What was your prior assignment in Customs Service?

A. I was Treasury Attaché in London, England.

Q. How long did you hold that position?

A. Four years, over 4 years; from December 1936—not quite 4 years—December 1936 to October 1940.

Q. What were your duties in that position?

A. Principally to make investigations to determine the home market value, export value, or in cases of cost of production of merchandise exported from Great Britain to the United States.

Q. Did your investigation cover all fields of commerce and in all parts of Great Britain?

A. It did; yes.

Q. In the course of your investigations did you have occasion to travel throughout Great Britain?

A. I did, to all parts of Great Britain and Ireland.

Q. How many men were in your office?

A. From 5 to 7 at various times.

Q. Did you have occasion to review the work which they did?

A. Yes; I assigned the work to them and reviewed their reports before they were sent out.

Q. Did you personally make investigations involving the value of merchandise in Great Britain?

A. I did; I made many.

Q. Did you review similar investigations made by your associates in that office?

A. Yes; I reviewed all investigations made by my associates.

Q. And in the course of these investigations was it necessary for you to consider the value of merchandise in English currency and compare it with the value in United States currency or convert to the value in United States currency?

A. Yes, indeed; whenever the sale was made in sterling we verified the payment. Payment, of course, was usually made in dollars, and we had to verify the conversion. Oftentimes we, as a matter of interest to ourselves, compared an export value in dollars with a home market value in sterling, sort of anticipate what the appraiser would do, and often we advised the exporter on what the appraiser was likely to do.

Q. Prior to your assignment in England what was your experience in Customs insofar as it related to the conversion of currency?

A. In all of my experience in Customs, which amounts to some 25 years now, I have been connected with the conversion of currency to some extent or other. I was liquidator for 4 years and liquidators are converting currency daily.

Q. Over what period of time, Mr. Kennedy?

A. I came in the Customs Service in 1920. From 1924 to 1930 I was liquidator.

[fol. 60] Q. What was your next assignment?

A. Next assignment, I was a Customs agent for 2 years. I had little to do with the conversion of currency then.

Then I went to Puerto Rico as Assistant Collector; was Assistant Collector for 2 years and Collector for 2 years, and at that time the Acting Appraiser came under the supervision of the Collector. The liquidators, as you know, came under the supervision of the Collector. Both of them had problems relating to the conversion of currency, which came to my notice sometimes for my advice or approval; sometimes just as a matter of interest, what they were doing.

Q. And during your assignment in Great Britain, and particularly in the period from September 1939 to June 1940, did you ever personally buy currency in Great Britain with United States dollars?

A. Yes; as a matter of necessity. I was paid in dollar checks drawn on the Treasury of the United States, just as are all Government employees, and had to convert those dollars into pounds sterling in order to pay my living expenses in England.

Q. After September 3, 1939, what was the procedure which you followed in purchasing pounds sterling?

Mr. Colburn: That is objected to as wholly immaterial, what he purchased in the United Kingdom. We are concerned with the construction of a statute that deals with purchase in the New York market by cable transfer, not what someone might be doing going around the corner in London, Birmingham, or some place else in England.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. During the period from September 3, 1939, to June 1940, did you ever purchase pounds in the New York market at the rate which is designated as free?

Mr. Colburn: Objected to. We are not interested in what he may have done. We are interested only in what the Federal Reserve has certified. I might have gone out and bought them. That doesn't make any difference.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception. Offer to prove that this witness purchased pounds in the New York market between the period of September 3, 1939, and June 1940 and purchased those pounds at the free rate.

[fol. 61] By Mr. Donohue:

Q. What procedure did you follow in purchasing pounds in the New York market at the free rate between September 1939 and June 1940?

Mr. Colburn: Objected to. It just follows up the question to which the court sustained an objection.

Mr. Donohue: That is correct, your Honor.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: I offer to prove by this witness that he purchased pounds in the New York market between the period from September 3, 1939, and June, 1940, and purchased such pounds at the free rate.

Judge Keefe: What is the purpose in the question, Mr. Donohue? Say he did. I haven't any doubt that thousands did. What is your purpose in your question?

Off the record.

(At this point there was discussion which the court ordered off the record.)

By Mr. Donohue:

Q. Could pounds sterling purchased at the official rate be used in England to purchase woollens and all other types of merchandise?

Mr. Colburn: That is objected to. What difference does that make, to prove that the merchandise at bar was purchased with the pound sterling obtained at the free rate? If somebody else could get them on a different basis, I submit it is wholly immaterial, enters the field of speculation.

Mr. Donohue: I don't think I follow counsel in saying that this is connected with the free rate. If there are two pounds sterling, then the conversion here was at the official rate. It is claimed that the conversion should be at the free rate. It is part of our case to establish that the rate of conversion here used, if it affected a currency, affected a currency which could be used for the purchase of this merchandise. It is relevant to the case.

Mr. Colburn: Trying to justify the action of the Secretary in suppressing or attempting to suppress a duly certified rate. It makes no difference.

Mr. Donohue: There we have it. The question is whether or not the action of the Secretary is legal.

Mr. Colburn: No; that isn't the question at all. It is merged and becomes a part of the action of the Collector, as this court has held.

Judge Cline: Read the question.

(The question was read by the reporter.)

[fol. 62] Judge Cline: Isn't that what the stipulation says would be purchased, but only at the official rate in England?

Mr. Donohue: Not woollens, your Honor.

Mr. Colburn: Not woollens, your Honor; certain things that had to be purchased at the official rate.

Judge Cline: Yes.

Mr. Colburn: And that is where it stopped. Everything else was left open.

Judge Cline: Well, that is it.

Judge Ekwall: He is asking whether if they are purchased at the free rate; they certainly would be.

Mr. Colburn: You could go out and cover your house with gold bricks if you wanted to, but why would you pay four naught three when you could pay three four five and did pay three four five.

Mr. Donohue: That is very good testimony, but the witness is on the stand, and I would like to establish that fact from the witness.

Judge Keefe: I think if you will concede, Mr. Donohue, that the court has sufficient intelligence to realize he could buy it with the official four naught five or four naught three—whatever it was—as well as with three or three two two, wouldn't you—

Mr. Donohue: Your Honor, I certainly don't mean to reflect on the intelligence of the court, but after Mr. Colburn and I have confused the case in the manner in which we have—

Judge Keefe: Off the record.

(At this point there was discussion which the court ordered off the record.)

Mr. Donohue: If I may explain the purpose of the question in this way: The official rate is used. It is our purpose to show that the official rate was the only over-all rate, the only rate that could be used for all purposes; that this so-called free rate was a rate that could be used in some respects, but not every respect.

Judge Ekwall: Well, do you contend that it couldn't be used for the purchase of woolen to export from England? That is the question, it seems to me.

Mr. Donohue: Oh, no, your Honor. Let me understand your Honor's question.

Judge Ekwall: I mean, do you contend that the free rate could not be used for the purchase of woolen for export to the United States?

Mr. Donohue: We concede that pounds sterling purchased at the free rate could be used for the purchase of woolens to be exported to the United States on May 3, 1940. We concede that.

[fol. 63] Judge Ekwall: Do you concede that it was done in the purchase of these particular goods?

Mr. Donohue: No, your Honor. We stand by the facts as stated in the stipulation. Those facts are plaintiff's facts, and as stated there, we agree to them.

Judge Ekwall: Well, on this particular question it seems to me perfectly obvious that you could purchase for four dollars and three and a half cents what you could purchase for three dollars twenty-two cents in England. I don't see any particular harm for the question to be answered; but I think there is no use of it, because I think it is perfectly obvious. I think we can take judicial notice of that fact.

We already have in evidence the fact that there were two different rates. That is in the evidence which has been put in by stipulation between the parties, that there were two rates on that day, and of course, you could buy for the higher rate what you could buy for the lower rate.

Mr. Donohue: Well, do I understand that the court will judicially notice that pounds purchased at the official rate could be used in the United Kingdom for all purposes? If that fact is judicially noticeable and is judicially noticed, then I can eliminate some of this testimony.

Judge Ekwall: Pounds purchased at the higher rate in the United Kingdom could be used for purchasing within the United States.

Mr. Donohue: For all purposes, your Honor? This witness can establish that fact. I think it is relevant to the case, and I think the court should have the benefit of his testimony.

Mr. Colburn: Of course, the court has a companion of that. The court would necessarily also judicially recognize

that pounds purchased at the free rate could be used for the payment of everything exported to the United States except the commodities set forth in Exhibit 4, I take it.

Judge Ekwall: Let's hear this question once more.

(Read by reporter.)

"Q. Could pounds sterling purchased at the official rate be used in England to purchase woollens and all other types of merchandise?"

Judge Keefe: The other witness testified that the pound, either official or free, was interchangeable in England and could be used for any purpose.

Mr. Donohue: I don't want to trust my recollection on it, your Honor. I think this witness can testify on that point, and the evidence is relevant to the case.

[fol. 64] Judge Ekwall: The objection will be overruled. He may answer the question.

A. The pounds sterling purchased at the official rate could be used for any purpose in the United Kingdom, for purchase of any material and for any purpose.

By Mr. Donohue:

Q. Could pounds sterling be used for the purchase of any material, whether for domestic consumption or exportation, when those pounds were purchased at the official rate?

A. Yes.

Q. Was there any distinction in the United Kingdom between the use of pounds purchased at the official rate and the use of pounds purchased at the free rate?

A. As to the pound notes themselves, no; once they were in circulation they were indistinguishable one from the other.

Q. What, if any, was the distinction as to the use of pounds purchased at either rate?

A. On and after March 25, 1940, and up to June 10, 1940, certain commodities, 5 in number, could be purchased for exportation to the United States only in United States dollars or in pounds purchased at the official rate; and if the British exporter was selling one of those commodities for exportation he would necessarily require proof in advance they would be paid for in pounds—for instance, at the official rate or in dollars—because he would be

unable to get his export license to ship them until he could prove that.

Q. Did the requirement as to proof that the pounds were purchased at the official rate attach to the passage of title or the permission to export?

Mr. Colburn: Pardon me just a moment. May I ask the question be read?

Judge Keefe: Read the question.

(The question was read by the reporter.)

Mr. Colburn: That is covered by regulation. The evidence is before the court. This witness has shown no competence to interpret the British law. I object.

Judge Ekwall: I think it is objectionable on that ground.

Mr. Donohue: I will qualify the witness further.

By Mr. Donohue:

Q. During your stay in England were you frequently consulted by English firms exporting merchandise to the United States?

A. Yes.

Q. Were you required to advise these exporters on the manner in which the merchandise could be exported to the United States?

A. Yes.

[fol. 65] Q. Did you have occasion to study the manner in which Exhibit 4, regulation 291, operated in the United Kingdom?

A. Yes.

Q. As a result of your studies on this point, are you able to state whether or not the requirement that pounds sterling be purchased at the official rate for the purchase for export of certain merchandise attached to the right to buy or the right to export? Are you able to say that?

Mr. Colburn: Objected to as wholly immaterial.

Mr. Donohue: It is a qualifying question.

By Mr. Donohue:

Q. Answer "yes" or "no," please.

Judge Ekwall: Objection is overruled as to this.

A. Yes.

By Mr. Donohue:

Q. Will you state whether during the period from March 25th to June 10, 1940, the requirement that pounds sterling be purchased at the official rate for the purchase of certain commodities affected the right to purchase or the right to export those commodities?

A. Affected only the right to export.

Mr. Donohue: That is all, Mr. Kennedy.

Cross-examination.

By Mr. Colburn:

X Q. But 291 says "payment," doesn't it?

A. Yes.

X Q. It does? Your answer was "yes"?

A. I would have to read the order, frankly, to remind myself exactly:

X Q. Well, you testified pretty freely about it on direct examination. You don't recall the order?

A. Well, not word for word.

X Q. You testified that the pound sterling purchased at the official rate could be used in the United Kingdom in payment for all classes of merchandise.

A. Yes.

X Q. That pounds sterling purchased in the New York market at the free rate could not be used in payment for whiskey, tin, rubber, furs, or jute exported to the United States, could they?

A. That would be the effect. My recollection is they would not get an export license unless they could prove—

X Q. That they had paid for it in another kind of payment. Everything else exported to the United States could be paid for with pounds sterling purchased at the free rate, though, couldn't it?

A. Yes.

X Q. Including woolens?

A. Yes.

[fol. 66] X Q. And prior to March 25, 1940, whiskey, furs, tin, rubber, and jute could be, and were, purchased at the free rate, too, weren't they?

A. Yes; that is so.

Mr. Colburn: That is all.

Redirect examination.

By Mr. Donohue:

R. Q. After March 25, 1940, could diamonds purchased with pounds acquired at the free rate be exported to the United States?

A. After June 10, 1940, I know they could not. I am not clear as to the situation with regard to diamonds in particular—it was a strange situation there between March and June 1940. The situation was not a matter of public record. Therefore, I do not know exactly what the situation was.

Mr. Donohue: That is all, Mr. Kennedy.

Mr. Colburn: Well, I have here the diamond order if you want to offer it. Do you wish to offer it—copy of the order with respect to diamonds?

Mr. Donohue: Not at the moment.

Mr. Colburn: No further questions.

(Witness excused.)

Mr. Donohue: I have another witness. Does the court care to—

Judge Cline: Let's recess until 2:30.

(Court recessed until 2:30.)

(Court reconvened at 2:30 p. m.)

Mr. Donohue: Mr. Glasser.

HAROLD GLASSER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: And your address, please?

The Witness: 622 Bennington Drive, Silver Spring, Maryland.

Direct examination.

By Mr. Donohue:

Q. Mr. Glasser, what is your present position?

A. I am Assistant Director of the Division of Monetary Research, in the Treasury Department.

Q. How long have you been so engaged?

A. 6 years.

Q. What has been your education and experience in the field of monetary research?

A. From the years 1922 to 1935 I studied, did research work in, and taught economics, finance, and monetary problems.

Q. Where did you study and where did you teach?

A. I studied at the University of Chicago and Harvard University. I was research fellow at Brookings Institution. I taught at the University of Akron and the People's Junior College in the City of Chicago.

[fol. 67] Q. What are your duties in your present position?

A. I supervise, engage in the study, the interpretation, and the analysis of economic and monetary problems, particularly those touching upon the international sphere, and prepare recommendations for the Secretary of the Treasury with reference to these problems.

Q. As part of your official duties, did you make any research of the British currency situation?

A. I have continuously studied the British foreign exchange problems from 1936 until 1940, June of 1940, when I left for South America.

Q. And when you were in South America, what were your duties?

A. I was adviser to the Ministry of Finance in the Republic of Ecuador, in which position I advised the Ministry of Finance and the government of Ecuador with respect to problems of their exchange control, the problems of their relationship of their currency with foreign currencies; all monetary problems, tax problems, and economic problems generally.

Q. Specifically, since September 1939, what investigations did you make concerning the sale and use of British pounds purchased at the free and official rates?

A. The sterling dollar rate was, of course, of the greatest interest to the Treasury Department.

Judge Ekwall: I didn't hear that.

The Witness: I say the sterling dollar rate, exchange rate, was, of course, of the greatest interest to the Treasury Department; and in my official capacity I supervised and participated in studies attempting to understand, to interpret, and to analyze the British exchange control system,

its effects upon the United States, its effects upon the various international arrangements with, such as, for instance, the British Trade Agreement and the Tripartite Monetary Court of 1936.

By Mr. Donohue:

Q. What sources of information did you refer to in making such investigation?

A. We used, of course, all sources of information available to the Treasury Department, including diplomatic dispatches, the published literature, and then the results of any special investigations that were made. In this particular case we made a special study in New York, which I supervised, and used various members of my staff studying the methods used to acquire sterling in New York and the purposes for which that sterling was used.

Q. From your investigation, what did you find concerning the manner in which pounds purchased at the official and free rates were sold and used for the period between March and June, 1940?

[fol. 68] Mr. Colburn: That is objected to as wholly immaterial. We have a situation where we have an official certification of what the official and the free pounds were, the rates therefor. Anything this witness may offer that may be interesting would have no possible weight or effect upon this situation before the court. We are faced with the construction of the statute and the facts found by the body that Congress has designated to find what the currency rates are.

Judge Ekwall: Will you read the question?

(The question was read by the reporter.)

Judge Ekwall: Well, what is the object of the question?

Mr. Donohue: The object of the question, your Honor, is in line with the testimony which we have heretofore offered, to show the manner in which pounds purchased at the free and official rates were acquired in the New York market, the manner in which they were used. Only by evidence of that nature can we support the legality and the accuracy of the Collector's action in using the rate of exchange here which he did use.

Now, repeatedly plaintiff's counsel and I have argued on who is challenging, who is accepting the certification of

the Federal Reserve Bank. We, of course, are accepting that. Plaintiff's counsel submits that he, too, is accepting it, but at the same time the protest challenges the legality of the rate used.

Now, if this evidence does nothing else, it tends to show that the rate used was the legal rate. If that isn't squarely supporting the Collector's classification, I don't know what is—not classification; the Collector's use of the conversion rate—then I don't know what is.

Mr. Colburn: The court has the facts before it, consisting of these regulations; it has facts before it establishing that the merchandise at bar was bought and paid for with pounds sterling obtained at the free rate. What light can the testimony of a general character as to the uses or how they were—pounds were—obtained shed on the controversy before the court?

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. Mr. Glasser, I refer you to Exhibit 4, which is Defence Finance Regulation 291, and particularly to page 2 thereof, wherein, under subparagraph 2, certain classes of merchandise are enumerated. I ask you whether or not you made any investigation to determine whether on and after March 25, 1940, commodities other than those listed in Exhibit 4, on page 2, were purchased by the use of pounds [fol. 69] acquired at the official rate? Did you make any investigation covering that subject?

A. I did.

Q. As a result of your investigation, can you state whether or not commodities other than those listed on page 2 of Exhibit 4 were purchased for export to the United States by pounds acquired at the official rate?

Mr. Colburn: That is objected to as wholly immaterial.

Mr. Donohue: Well, now, your Honor, it is certainly testimony directed to a controverted point. Counsel for plaintiff has presented to this court that the use of free pounds, or that free pounds—pounds purchased at the free rate—could be used for all purposes except the commodities listed in Exhibit 4. That is his contention, as I understand it.

If that evidence is in, it is because it must be relevant to his case.

The question here is directed to test the fact, the ultimate truth of that, whether or not that is true or whether or not there were exceptions to it.

Here is a witness who made investigations, who is ready to state whether or not pounds purchased at the official rate could be used and were used for the purchasing of commodities other than those listed in the exhibit. Now, that is relevant to the case.

Judge Ekwall: What difference would it make if, under the law there, there were just the 5 exceptions?

Mr. Donohue: If there were just the 5 exceptions, then those exceptions are set forth in this order 291, and it could be argued that the Treasury Department had before it that evidence; and while I don't submit that two rates could be used, plaintiff may contend that two rates could be used, and that one rate should be used for this merchandise and one rate for all other merchandise. But if I can show by this witness that not only these commodities but other commodities were purchased with pounds acquired at the official rate, and if I can show by him, and I think I can, that there is no way of knowing from the invoice and entry whether the pounds were purchased at the free or official rate, those facts show that the Customs officials would have no way of establishing a uniformity for the use of a conversion rate. Not only these 5 commodities but other commodities could be purchased with pounds acquired at the official rate, and were purchased with pounds acquired at the official rate.

Mr. Colburn: And what difference would that make, if the merchandise at bar was purchased with pounds obtained at the free rate, so long as there existed a certification of that free rate? I submit it is wholly immaterial.

[fol. 70] Mr. Donohue: It may be that the plaintiff is going to contend that there should be a rate of conversion for each separate importation. I don't know, but certainly I will be able to argue, I believe, in our brief, that such a policy would not be capable of administration.

Now, one thing that we think we can show is that a policy which requires the use of two rates for a single currency is not capable of administration, and the extent to which the currency purchased at these rates could be used is a relevant fact in establishing that.

Mr. Colburn: But my friend's straw is probably trying the solution elsewhere. The court will take judicial notice of the fact that there are more than 4, at least, certifications of currency current in China. I have heard no great wail about the difficulties of administration in applying those various certifications. Certainly it would seem a simple matter for the Collector to determine whether given goods were paid for with free pounds or official pounds. That doesn't seem to me to present any insuperable barrier, if and assuming it was a matter that would enter into consideration by this court.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that during the period between March 25th and June 1940, articles other than whiskey, rubber, tin, jute, and furs were purchased in the United Kingdom for export to the United States by pounds sterling acquired at the official rate; that these articles included, among other things, woolen goods.

By Mr. Donohue:

Q. Mr. Glasser, did you make any investigation to determine whether or not between the period of March and June 1940 it was required that diamonds when purchased for export to the United States be purchased either in United States dollars or in pounds acquired at the official rate? Did you make any investigation?

A. Yes; I did.

Q. And as a result of your investigation what did you learn?

A. I learned that the purchase of diamonds in England for export required that they be paid for either in dollars or in sterling acquired at the official rate.

Q. Over what period of time was that true?

A. It was in effect some time in February 1940.

Q. Of what year?

A. 1940.

[fol. 71] Q. I show you a copy of Statutory Rules and Orders 1940 No. 689, and I ask you whether or not that refers to diamonds and places them on the list covered by regulation 291, Exhibit 4?

A. This is the Treasury order requiring by law what had been required informally previously.

Q. May I have the exhibit?

A. On this is the 9th of May.

Mr. Colburn: I object to so much of the witness' statement as relates to what had been required informally prior to the order of the British treasury which was shown him. I don't think he has any competence to make such a statement. I ask so much of his answer as relates to that be stricken.

Mr. Donohue: I will consent it be stricken for the moment because it is not responsive to this question.

Judge Ekwall: That portion will be stricken.

Mr. Donohue: I ask that the Statutory Rules and Orders No. 689 be received in evidence.

Mr. Colburn: No objection.

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Defendant's Exhibit 10" in Protest No. 57467-K, as of this date.)

By Mr. Donohue:

Q. Now, Mr. Glasser, you stated that you investigated the purchase of diamonds for export to the United States. What did you do in the course of that investigation?

A. We received diplomatic dispatches, which gave us the basis, gave me the basis for my conclusion that diamonds were sold for export to the United States—

Mr. Colburn: Just a moment. He was asked the question how he went about it. Now we are not interested in the conclusions as a part of this answer, and I am going to object to that conclusion, of course. I ask you to continue your answer, please, to how you got the information.

Judge Ekwall: I think that objection is good.

A. I received the information from a study of the diplomatic dispatches received at the Treasury Department.

By Mr. Donohue:

Q. What is the source of the diplomatic dispatches?

A. These diplomatic dispatches were prepared in the American Embassy in London by persons who were obtain-

ing information at the specific request of the Treasury Department, relating to the study of the methods and administration of the British Exchange Control System.

[fol. 72] Q. Are these the same diplomatic dispatches that you have previously referred to that were used in your other investigation?

A. That is right.

Q. Is the information which they contain accepted by the Treasury Department?

A. It is accepted by the Treasury Department; yes.

Q. Now, as a result of your investigation what did you find concerning the purchase of diamonds for export to the United States as to the currency required to purchase.

Mr. Colburn: For any period of time?

Mr. Donohue: Between February and June of 1940.

Mr. Colburn: That is objected to. I might add to my general ground of objection that the witness' source of information is patently hearsay, second-hand. While the Treasury Department may accept it for its purposes that is a far cry from what may be valid proof in a court of law.

My second objection is that in any event it is wholly immaterial how diamonds may have been some time or other paid for. The merchandise before the court is woolen.

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that from February to June 1940 diamonds could be purchased for export to the United States only when the currency of purchase was United States dollars or pounds that had been acquired at the official rate.

By Mr. Donohue:

Q. At all times between September 1939 and June 1940 was there one or more than one type or kind of pounds sterling in circulation in the United Kingdom?

Mr. Colburn: That is objected to; witness is wholly incompetent.

Mr. Donohue: The witness has testified that as part of his official duties he studied the monetary situation in great detail.

Now, a person who studies for the purpose of ascertaining facts which cannot be testified to at first hand qualifies as an expert. If this gentleman, with his study, with his background, experience and education, is not an expert in the field of monetary research the Treasury Department is making a mistake, because he is there regarded as such. He has qualified here in the only way that I know how to qualify a monetary expert. That is his field.

Mr. Colburn: He never spent any time in England, but based his whole study upon something somebody else reported; and also, it is another effort to attack indirectly the finding of the Federal Reserve Bank.

Mr. Donohue: Well, I hope that I can make one disavowal of any attempt to attack the certification of the Federal Reserve Bank, and ask the court to regard that as standing for all purposes.

Judge Ekwall: Objection will be overruled. He may answer.

Mr. Colburn: Exception.

Judge Ekwall: Exception.

Judge Keefe: Read the question.

(The question was read by the reporter.)

A. There was only one type or kind of pound sterling circulated in the United Kingdom.

Judge Ekwall: Are you referring now to the physical or legal type?

The Witness: Well, I don't know anything about the law, but there was one, only one type or kind of pound sterling that was universally accepted.

Judge Ekwall: Well, I mean physical pound sterling.

The Witness: Well, either physical or bank deposits; of course, the usual form. There was no distinction between one person's bank deposit of sterling or parts of his deposit from other places. They were intermingled continuously and without any tagging.

By Mr. Donohue:

Q. Aside from the fact that there was no physical distinction was there any distinction as to the use of pounds sterling in the United Kingdom?

Mr. Colburn: Objected to again; same ground as heretofore stated. I don't believe this witness is competent to answer that question.

Again, I think it is an indirect attack upon the finding of the Federal Reserve Bank, necessarily, if the court please.

Judge Ekwall: Objection will be sustained to that.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. Between March and June 1940 could woolens be purchased in the United Kingdom for export to the United States with pounds acquired at the official rate?

Mr. Colburn: Objected to. What do we care whether they could or couldn't be? Again, speculation; the same question we had before lunch.

[fol. 74] Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove that between March and June of 1940 woolens could be purchased in the United Kingdom for export to the United States with pounds purchased at the official rate.

That is all.

Mr. Colburn: No questions.

(Witness excused.)

Mr. Donohue: We rest.

Mr. Colburn. Submit.

Mr. Donohue: Submit.

Mr. Colburn: I ask 30 days from the transcription of testimony for brief, if the court please.

Mr. Donohue: 30 days thereafter to reply.

Judge Ekwall: Time for briefs requested will be allowed.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed September 30, 1942

It is stipulated by and between the Assistant Attorney General for the United States and counsel for the importer in the above-entitled case:

1. That the merchandise covered by the entry the subject of the instant protest consists of woolen fabrics, the product of Scotland, exported from England to the United States on May 3, 1940.

2. That said merchandise was purchased by the plaintiff herein, John Barr, through James Talcott, Inc., New York, New York, from Messrs. Gibson & Lumgair, Ltd. of Selkirk, Scotland, at the invoice prices in pounds sterling, and was appraised under Section 402 of the Tariff Act of 1930 in unit prices in pounds sterling.

3. That on September 3, 1939, the Government of the United Kingdom issued by an Order in Council The Defence (Finance) Regulations Amendment Order, 1939, Statutory Rules and Orders 1939, No. 1067, which was amended and modified by an Order in Council issued on September 21, 1939, entitled The Defence (Finance) (No. 2) Regulations, 1939, Statutory Rules and Orders 1939, No. 1251; that the foregoing Defence (Finance) Regulations, Amendment Order, 1939, and Defence (Finance) (No. 2) Regulations, 1939, were superseded by an Order in Council issued by the Government of the United Kingdom on November 23, 1939, entitled The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, No. 1620, sections 2 and 5 (among others) of which were in effect on May 3, 1940; that true and correct copies of the aforementioned Defence (Finance) Regulations Amendment Order, 1939, Defence (Finance) (No. 2) Regulations, 1939, and Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, Nos. 1067, 1251, and 1620, respectively, are attached hereto and made a part hereof and, subject to the ruling of the Court, may be received in evidence in this case and marked Exhibits 1, 2, and 3 respectively; that United States dollars were on September 4, 1939, and at all times thereafter

to date, designated by the British Treasury in accordance with section 5 (4) of the aforementioned Defence (Finance) Regulations Amendment Order, 1939, and of the aforementioned Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders Nos. 1067 and 1620, respectively; and that the price determined by or on behalf of the British Treasury under section 5 of the last mentioned two Orders for United States dollars and the rate at which "authorized dealers" sold pounds sterling for United States dollars was from September 3, 1939, to September 13, 1939, inclusive, \$4.06 per pound sterling, and from September 14, 1939, to January 7, 1940, inclusive, \$4.04 per pound sterling, and from January 8, 1940, to the present time, inclusive, has been \$4.035 per pound sterling.

4. That effective March 25, 1940, the Government of the United Kingdom issued by an Order in Council (Statutory Rules and Orders 1940, No. 291) certain regulations amendatory of The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, mentioned in the preceding paragraph of this stipulation that the regulations in Statutory Rules and Orders 1940, No. 291, were in effect on May 3, 1940 and that a true and correct copy of Statutory Rules and Orders, 1940, No. 291 is attached hereto and made a part hereof and, subject to the ruling of the Court, may be received in evidence in this case and marked "Exhibit 4."

5. That effective June 10, 1940, by an Order in Council, a further regulation of the Government of the United Kingdom was issued and was implemented by an order of the British Treasury effective the same date, under which regulation and order the restrictions as to payment for the [fol. 76] commodities specified in Exhibit 4 mentioned in paragraph 4 hereof, exported to the United States, with certain exceptions not here relevant, were extended to all goods and merchandise exported to the United States from the United Kingdom; and that said regulation and order are set forth in Statutory Rules and Orders 1940, No. 892, and Statutory Rules and Orders 1940, No. 894, respectively, attached hereto and made a part hereof, and, subject to the ruling of the Court, may be received in evidence herein and together marked "Exhibit 5."

6. That at all times prior to March 25, 1940, the Federal Reserve Bank of New York stating that it was acting under

section 522 (c) of the Tariff Act of 1930 certified daily to the Secretary of the Treasury one buying rate for the pound sterling.

7. That prior to March 25, 1940, there was received by the Secretary of the Treasury a letter from the Federal Reserve Bank of New York, dated March 19, 1940, signed by Vice President L. W. Knoke of that Bank, a true and correct copy of which letter is attached hereto, made a part hereof, and, subject to the ruling of the Court, may be received in evidence and marked "Exhibit 6."

8. That beginning March 25, 1940, and at all times thereafter to the date hereof, the Federal Reserve Bank of New York, stating that it was acting under section 522 (c) of the Tariff Act of 1930, certified daily to the Secretary of the Treasury buying rates in the New York market at noon of foreign currencies in the form and manner of the paper attached hereto and made a part hereof, which, subject to the ruling of the Court, may be received in evidence herein and marked "Exhibit 7"; and that on May 3, 1940, the date of exportation of the involved merchandise to the United States, the buying rates so certified by the Federal Reserve Bank of New York to the Secretary of the Treasury were as set forth in said Exhibit 7.

9. That under the provisions of section 522 (a) of the Tariff Act of 1930, the value estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury as the value of the pound sterling in terms of the money of account of the United States for the quarter beginning April 1, 1940, was \$8.2397; and that that proclamation of the Secretary of the Treasury is published in T. D. 50125.

10. That the pounds sterling used in the purchase of the merchandise involved in the instant protest were not obtained directly or indirectly from the Bank of England or from an "authorized dealer" as that phrase is defined in section 2 (2) of The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, No. 1620; that said pounds sterling were purchased by the plaintiff herein through The Guaranty [fol. 77] Trust Company of New York in the New York market for cable transfer on May 22, 1940, at \$3.21; that on May 22, 1940, the Federal Reserve Bank, stating that it was acting under Section 522 (c), certified to the Secre-

tary of the Treasury the following buying rates: Pound Sterling, \$4.035000 "official"; Pound Sterling, \$3.227187 "free."

11. That Article 822 (d) of the Customs Regulations of 1937, which was in effect on May 3, 1940, provided:

"(d) Rates of exchange for the principal foreign currencies as certified daily by the New York Federal Reserve Bank will be furnished daily by the Customs information exchange to customs officers in the number of copies required, and liquidation will not be made until such Federal reserve bank rates are received. In special cases, or where a rate of currency does not appear on the daily list furnished, the collector will request such rate from the customs information exchange;"

and that the Customs Information Exchange furnished daily to customs officers, customs brokers, and importers concerned a circular setting forth buying rates certified daily by the Federal Reserve Bank of New York which that Bank stated were certified pursuant to section 522 (c), and that a true and correct copy of the circular furnished on May 3, 1940, which is attached hereto and made a part hereof, subject to the ruling of the Court, may be received in evidence and marked "Exhibit 8."

12. That the dutiable value of the involved merchandise was converted by the collector of customs on liquidation for the purpose of assessment and collection of duties from pounds sterling into currency of the United States at the buying rate designated "official" certified by the Federal Reserve Bank of New York for pounds sterling on May 3, 1940, that is, at \$4.035 per pound sterling, and that such action by the collector was pursuant to the directors and orders of the Secretary of the Treasury in T. D. 50134 and T. D. 50146.

Dated New York, N. Y., September 30, 1942.

Barnes, Richardson & Colburn, J. Bradley Colburn,
Attorneys for the Plaintiff; Paul P. Rao, Assistant
Attorney General, Attorney for the Defendant,
by Joseph F. Donohue, Special Attorney.

[Filed in Open Court 9/30/42. F. G.]

Statutory Rules and Orders

1939 No. 1067 Emergency Powers (Defence) Finance

The Defence (Finance) Regulations Amendment Order,
1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1939. Price 3*d.* net.

[Statutory Rules and Orders 1939 No. 1067—Emergency Powers (Defence) Finance—The Defence (Finance) Regulations Amendment Order, 1939.—At the Court at Buckingham Palace, the 3rd day of September 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939,¹ and of all other powers enabling him in that behalf, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the Defence (Finance) Regulations, 1939,² shall be amended so as to read as follows:—

Acquisition by Treasury of Certain Securities

1. (1) The Treasury may by order direct—

(a) That, subject to any exemptions for which provision may be made by the order, no person shall, except with permission granted by or on behalf of the Treasury, sell,

This Order in effect supersedes the Order in Council (S. R. & O. 1939, No. 950), dated 25th August 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

¹ 2 & 3 Geo. 6. c. 62.

This Order in effect supersedes the Order in Council (S. R. & O. 1939, No. 950), dated 25th August 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

² 2 S. R. & O. 1939, No. 950.

transfer, or do anything which involves the creation of a charge on, securities of any such class as may be specified in the order, being a class of securities which, in the opinion of the Treasury, are likely to be marketable outside the United Kingdom, and

(b) That the owner of any securities of the said class shall, in such manner and within such period as may be specified in the order, make a return to the Bank of England giving such particulars with respect to those securities as may be so specified.

[fol. 79] For the purposes of this paragraph a person who mortgages or pledges a security shall be deemed thereby to create a charge on the security.

(2) At any time while an order made under the preceding paragraph with respect to securities of any class is in force, the Treasury, if they are of the opinion that it is expedient so to do for the purpose of strengthening the financial position of the United Kingdom, may, by an order made generally with respect to any specified securities of that class, or by directions given with respect to any securities of that class of which any particular person is the owner, transfer to themselves the securities to which the order or directions relates or relate, at a price specified in the order or directions being a price which, in the opinion of the Treasury, is not less than the market value of the securities on the date of the making of the order or the giving of the directions.

(3) Where any order is made, or any directions are given, under the last preceding paragraph with respect to any securities—

(a) Those securities shall forthwith vest in the Treasury free from any mortgage, pledge or charge, and the Treasury may deal with the securities as they think fit.

(b) The owner of any of those securities, and any person who is responsible for keeping any register or book in which any of those securities is registered or inscribed or who is otherwise concerned with the registration or inscription of any of those securities, shall do all such things as are necessary or as the Treasury or the Bank of England on their behalf may direct to be done for the purpose of

securing that the security and any document of title relating thereto will be delivered to the Treasury or to such person as the Treasury may direct and, in the case of any registered or inscribed security, that the security will be registered or inscribed in the name of the Treasury or such person as the Treasury may direct.

(4) The duty to deliver any security under the last preceding paragraph shall include a duty to do all such things as are necessary to secure that any dividends or interest on that security becoming payable on or after the date of the making of the order or the giving of the directions will be paid to the Treasury; and where, in the case of any security payable to bearer which is delivered in pursuance of the said paragraph, any coupons representing any such dividends or interest are not delivered with the security, such reduction in the price payable therefor shall be made as the Treasury think fit. *Provided*, That where the price specified in the order or directions in relation to any securities is ex any dividend or ex any interest, this paragraph shall not apply to that dividend or interest or to any coupon representing it.

[fol. 80] (5) A certificate signed by any person authorised in that behalf by the Treasury that any specified securities are securities transferred to the Treasury under this Regulation shall be treated by all persons responsible for keeping any registers or books in which the securities are registered or inscribed, or who are otherwise concerned with the registration or inscription of those securities, as conclusive evidence that the securities have been so transferred.

(6) This Regulation shall not apply to any security if the Treasury are satisfied that at all times since the beginning of the twenty-sixth day of August, nineteen hundred and thirty-nine, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom.

Restriction on Purchase, Sale, and Loans of Foreign Currency and Gold

(2) In this Regulation the expression "authorised dealer" of the Treasury, no person other than an authorised dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.

(2) In this Regulation the expression "authorised dealer" means, in relation to any transaction in respect of gold, a person authorised by or on behalf of the Treasury to deal in gold, or, in relation to any transaction in respect of foreign currency, a person authorised by or on behalf of the Treasury to deal in foreign currency.

Restriction on Export of Currency, Gold, and Securities, &c.

3. (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury—

(a) Take or send out of the United Kingdom any bank notes, postal orders, gold, securities, or foreign currency, or transfer any securities from the United Kingdom elsewhere, or

(b) Draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or the Isle of Man is created or transferred as consideration—

(i) For receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man, or

(ii) For a right (whether actual or contingent) to receive a payment, or acquire property, outside the United Kingdom and the Isle of Man,

or make any payment as such consideration.

[fol. 81] (2) The preceding paragraph shall not restrict the doing of anything, within the scope of his authority, by a person authorised by or on behalf of the Treasury to deal in foreign exchange, and shall not restrict the doing

of anything which is certified by or on behalf of the Treasury to be necessary for the purpose—

(a) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man, or

(b) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(c) Of defraying reasonable travelling or other personal expenses.

(3) Any person who on any occasion is about to leave the United Kingdom (which person is hereafter in this paragraph referred to as "the traveller") shall, if requested so to do by the appropriate officer—

(a) Declare whether or not he has with him any bank notes, postal orders, gold, securities, or foreign currency;

(b) Produce any bank notes, postal orders, gold, securities, or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search the traveller and examine or search any article which the traveller has with him, for the purpose of ascertaining whether he has with him any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency produced or found upon such examination or search unless either—

(i) The appropriate officer is satisfied that the traveller is, in respect of any bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, exempt from the restriction imposed by paragraph (1) of this Regulation; or

(ii) The traveller produces to the appropriate officer such a certificate granted by or on behalf of the Treasury as shows that the exportation by the traveller of any bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion does not involve a contravention of that paragraph:

Provided, That no female shall be searched in pursuance of this paragraph except by a female.

(4) Nothing in the preceding provisions of this Regulation shall apply in relation to the taking, sending, or transferring of anything from one part of the United Kingdom to another or from the United Kingdom to the Isle of Man, or in relation to any person traveling between one part of the United Kingdom and another or between the United Kingdom and the Isle of Man.

(5) As respects any goods being goods consigned from the United Kingdom to a destination which is neither in the United Kingdom nor in the Isle of Man, the appropriate officer and any person acting under his directions may examine or search the goods for the purpose of ascertaining [fol. 82] whether there are being sent therewith any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency found upon such examination or search unless there appears to the appropriate officer to have been granted by or on behalf of the Treasury a certificate which shows that the sending as aforesaid of the bank notes, postal orders, gold, securities, or foreign currency does not involve a contravention of paragraph (1) of this Regulation.

(6) For the purposes of this Regulation—

(a) Any bills of exchange or promissory notes payable otherwise than in sterling shall be deemed to be foreign currency;

(b) The expression "transfer" includes transfer by way of loan or security, and a person shall be deemed to transfer securities from the United Kingdom elsewhere if he transfers securities from a register in the United Kingdom to a register outside the United Kingdom; and

(c) The expression "the appropriate officer" means any officer of Customs and Excise, any immigration officer, any constable, or any person authorised by a Secretary of State to act under paragraphs (3) and (5) of this Regulation;

and for the purposes of so much of paragraph (1) of this Regulation as restricts the taking or sending of securities out of the United Kingdom, documents of title relating to securities shall be deemed to be securities, and references to securities in paragraphs (3) and (5) of this Regulation

shall be construed as including references to such documents of title as aforesaid.

Acquisition by Treasury of Gold Coin and Bullion

4. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any gold shall offer that gold, or cause it to be offered, for sale to the Treasury or a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury:

Provided, That the preceding provisions of this paragraph shall not impose upon any person an obligation to offer any gold for sale or to cause any gold to be offered for sale, if—

(a) He satisfies the Treasury or a person so designated—

(i) That all the persons interested in that gold, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in the gold under a trust, are not resident in the United Kingdom, or

[fol. 83] (ii) That the gold is required for the purpose of performing a contract made before the said day, or

(iii) That the gold is held for the purpose of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man otherwise than by way of dealing in gold, or

(b) He is, in respect of that gold, exempted from this Regulation by the Treasury or by a person so designated.

18 & 19 Geo. 5. c. 13

(2) The operation of section eleven of the Currency and Bank Notes Act, 1928, shall be suspended during the continuance in force of this Regulation.

Acquisition by Treasury of Certain Foreign Currency & c.

5. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into opera-

tion is, or after that date becomes, entitled to sell, or to procure the sale of, any foreign currency to which this Regulation applies shall offer it, or cause it to be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

(2) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to assign, or to procure the assignment of, any right to receive outside the United Kingdom and the Isle of Man, in respect of any credit or balance at a bank, payment of any amount in a foreign currency to which this Regulation applies, shall, unless the Treasury or a person designated by the Treasury for the purposes of this Regulation gives him notice to the contrary, do all things necessary for the purpose of assigning that right to the Treasury or to a person so designated.

The sum payable as consideration for any assignment made in accordance with this paragraph shall be such as may be determined by or on behalf of the Treasury.

(3) The preceding provisions of this Regulation shall not impose upon any person an obligation in respect of any currency or right to receive payment of any amount, if—

(a) He satisfies the Treasury or a person designated by the Treasury for the purposes of this Regulation that all the persons interested in that currency, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-[fol. 84] nine, but including any persons beneficially interested in the currency under a trust, are not resident in the United Kingdom, or

(b) He satisfies the Treasury or a person so designated that the currency or amount, as the case may be, is held or is required for the purpose—

(i) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(ii) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle

of Man otherwise than by way of dealing in foreign exchange, or

(iii) Of defraying reasonable travelling or other personal expenses, or

(c) He is, in respect of that currency or right, as the case may be, exempted from this Regulation by the Treasury or by a person so designated.

(4) The foreign currency to which this Regulation applies is such foreign currency as may from time to time be designated by the Treasury for the purposes of this Regulation, by notice published in the London, Edinburgh and Belfast Gazettes.

Control of Capital Issues

6. (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury and in accordance with such conditions as the Treasury may impose, to make an issue of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities, which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who—

(a) Issues any securities (whether for cash or otherwise), or

(b) Receives any money on loan on the terms, or in the expectation, that the loan will or may be repaid wholly or partly by the issue of any securities, or by the transfer of any securities issued after the making of the loan.

(4) In this Regulation, the expression "security" includes a promissory note of a local authority.

[fol. 85]

Exemption From Stamp Duty

7. (1) Stamp duty shall not be chargeable on any security by reason only of the assignment, transfer or negotiation thereof to the Treasury, and shall not be chargeable—

(a) On any instrument whereby any security is assigned or transferred to the Treasury (whether on sale or otherwise), or

(b) On any contract note for, or relating to, any sale of securities to the Treasury.

(2) This Regulation applies only in relation to assignments, transfers, negotiations or sales of securities effected during the continuance in force of this Regulation, whether in compliance with these Regulations or otherwise.

10 Edw. 7 & 1 Geo. 5. c. 8

^o (3) In this Regulation the expression “contract note” has the meaning assigned to that expression by subsection (3) of section seventy-seven of the Finance (1909-10) Act, 1910.

Power to Obtain Information

8. Without prejudice to any special provision contained in these Regulations, the Treasury may, for the purposes of securing compliance with these Regulations, give to any person directions requiring him, within such time, in such manner and to such persons as may be specified in the directions, to furnish such information as may be so specified and produce for inspection any relevant books, accounts, or other documents.

Application of Certain Provisions of Defence Regulations, 1939

9. The provisions of Part V of the Defence Regulations, 1939, shall apply for the purpose of the enforcement of these Regulations, and otherwise in relation thereto, as if any reference in the said Part V to those Regulations included a reference to these Regulations.

Interpretation

10. In these Regulations, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:

“Bank notes” means bank notes which are legal tender in the United Kingdom or in any part thereof;

“Foreign currency” means any currency other than sterling;

“Gold” means gold coin or gold bullion;

“Immigration officer” means an immigration officer for the purposes of the Aliens Order, 1920;

“Owner,” in relation to any security, includes any person who has power to sell or transfer a security, or [fol. 86] who has the custody thereof, or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon, or who has any other interest therein;

“Security” includes shares, stock, bonds, notes, debentures, debenture stock, and Treasury bills, but does not include a bill of exchange or, save as otherwise expressly provided, a promissory note; and

“Transfer,” in relation to securities, includes the transfer thereof from one register to another.

Short Title

11. These Regulations may be cited as the Defence (Finance) Regulations, 1939.

This Order may be cited as the Defence (Finance) Regulations Amendment Order, 1939.

Any order of the Treasury made under the Defence (Finance) Regulations, 1939, before the coming into force of this Order shall, as respects things done after the coming into force of this Order, have effect as if the said Regulations had at all times contained the definition of the word “transfer” which is included therein by virtue of this Order.

Rupert B. Howorth.

EXHIBIT No. 2

STATUTORY RULES AND ORDERS

1939 No. 1251 Emergency Powers (Defence) Finance

The Defence (Finance) (No. 2) Regulations, 1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1939. Price 1*d.* net.

[Statutory Rules and Orders 1939 No. 1251—Emergency Powers (Defence) Finance—The Defence (Finance) (No. 2) Regulations, 1939. At the Court at Buckingham Palace, the 21st day of September 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939,¹ and of all other powers [fol. 87] enabling him in that behalf, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the following Regulations shall have effect—

1. (1) The Treasury, by an order, made by them generally with respect to any description of securities, or by a certificate given by them or on their behalf with respect to any particular securities, may exempt the securities to which the order or certificate relates from the provisions of the principal Finance Regulations.²

(2) An order or certificate under the preceding paragraph shall be deemed to relate not only to the securities specified in the order or certificate, but also to any securities to which the owner of securities so specified may become or has become entitled as such, either by way of bonus or in consequence of any conversion operation, amalgamation or reconstruction.

2. (1) Nothing in any order under paragraph (1) or paragraph (2), or in paragraph (3), of Regulation 1 of the

¹ 2 & 3 Geo. 6. c. 62.

² S. R. & O. 1939 No. 1067.

principal Finance Regulations, and nothing in Regulation 3 of those Regulations, shall apply in relation to any exempted security.

(2) Where, by virtue of subparagraph (a) of paragraph (3) of Regulation 1 of the principal Finance Regulations, any security has become vested in the Treasury, then, at any time before the steps required by subparagraph (b) of that paragraph to be taken in relation to that security have been taken, the Treasury may, by a declaration made in writing on their behalf, divest themselves of the security; and thereupon the order or directions in consequence of which the security so became vested in the Treasury shall be deemed, for all purposes, not to have been made or given with respect to that security.

(3) Nothing in Regulation 5 of the principal Finance Regulations shall apply in relation to any amount of currency which an owner of an exempted security has become entitled as such to receive.

(4) In this Regulation, the expression "exempted security" means any security to which an order or certificate under Regulation 1 of these Regulations relates.

3. Paragraph (1) of Regulation 3 of the principal Finance Regulations shall have effect as if at the end of that paragraph there were inserted the following words:

"and the Treasury or a person acting on their behalf may impose such restrictions on the making of payments, and the doing of other acts, by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraph (b) of this paragraph:"

[fol. 88] 4. Paragraph (3) of Regulation 3 of the principal Finance Regulations shall have effect as if for subparagraph (ii) of that paragraph there were substituted the following subparagraph:

"(ii) The traveller produces to the appropriate officer a single certificate granted by or on behalf of the Treasury, showing, with respect to all bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, that the exportation thereof by him does not involve a contravention of that paragraph."

5. Regulation 5 of the principal Finance Regulations shall have effect as if at the end of that Regulation there were inserted the following paragraph:

“(5) Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view to facilitating the enforcement of this Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which the Regulation applies or not) by reason of the export of goods.

“Without prejudice to any liability to penalties under Part V of the Defence Regulations, 1939,³ any such declaration shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act, 1876⁴ (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the Customs; and if any goods in respect of which a declaration has been required under this paragraph to be delivered are shipped, put off, or water-borne to be shipped, without the declaration having been delivered in accordance with this paragraph, the goods shall be liable to forfeiture under the enactments relating to customs.”

6. Regulation 8 of the principal Finance Regulations shall have effect as if in that Regulation there were inserted after the words “the Treasury” the words “any person authorized by or on behalf of the Treasury, or any officer of customs and excise.”

7. In these Regulations the expression “the principal Finance Regulations” means the Defence (Finance) Regu-

³ S. R. & O. 1939 No. 927.

⁴ 39 & 40 Vict. c. 36.

lations, 1939; and these Regulations shall be construed as one with those Regulations.

8. These Regulations may be cited as the Defence (Finance) (No. 2) Regulations, 1939.

Rupert B. Howorth.

[fol. 89]

EXHIBIT No. 3

Statutory Rules and Orders

1939 No. 1620—Emergency Powers (Defence) Finance

The Defence (Finance) Regulations Amendment (No. 2) Order, 1939

[Statutory Rules and Orders 1939 No. 1620—Emergency Powers (Defence) Finance—The Defence (Finance) Regulations Amendment (No. 2) Order, 1939—At the Court at Buckingham Palace, the 23rd day of November, 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939,¹ and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that the Defence (Finance) Regulations, 1939,² shall be amended so as to read as follows:

Acquisition by Treasury of Certain Securities

1. (1) The Treasury may by order direct—

(a) That, subject to any exemptions for which provision may be made by the order, no person shall, except with per-

This Order (as well as revoking the Defence (Finance) (No. 2) Regulations 1939 (S. R. & O. 1939 No. 1251)) in effect supersedes the Defence (Finance) Regulations Amendment Order, 1939 (S. R. & O. 1939 No. 1067) which itself superseded the Order in Council (S. R. & O. 1939 No. 950), dated 25th August, 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

¹ 2 & 3 Geo. 6 c. 62.

² S. R. & O. 1939 No. 1067.

mission granted by or on behalf of the Treasury, sell, transfer, or do anything which involves the creation of a charge on, securities of any such class as may be specified in the order, being a class of securities which, in the opinion of the Treasury, are likely to be marketable outside the United Kingdom, and

(b) That the owner of any securities of the said class shall, in such manner and within such period as may be specified in the order, make a return to the Bank of England giving such particulars with respect to those securities as may be so specified.

For the purposes of this paragraph a person who mortgages or pledges a security shall be deemed thereby to create a charge on the security.

(2) At any time while an order made under the preceding paragraph with respect to securities of any class is in force, [fol. 90] the Treasury, if they are of the opinion that it is expedient so to do for the purpose of strengthening the financial position of the United Kingdom, may, by an order made generally with respect to any specified securities of that class, or by directions given with respect to any securities of that class of which any particular person is the owner, transfer to themselves the securities to which the order or directions relates or relate at a price specified in the order or directions, being a price which, in the opinion of the Treasury, is not less than the market value of the securities on the date of the making of the order or the giving of the directions.

(3) Where any order is made, or any directions are given, under the last preceding paragraph with respect to any securities—

(a) Those securities shall forthwith vest in the Treasury free from any mortgage, pledge or charge, and the Treasury may deal with the securities as they think fit;

(b) The owner of any of those securities, and any person who is responsible for keeping any register or book in which any of those securities is registered or inscribed or who is otherwise concerned with the registration or inscription of any of those securities, shall do all such things as are necessary or as the Treasury or the Bank of England on their

behalf may direct to be done for the purpose of securing that the security and any document of title relating thereto will be delivered to the Treasury or to such person as the Treasury may direct, and, in the case of any registered or inscribed security, that the security will be registered or inscribed in the name of the Treasury or such person as the Treasury may direct.

(4) The duty to deliver any security under the last preceding paragraph shall include a duty to do all such things as are necessary to secure that any dividends or interest on that security becoming payable on or after the date of the making of the order or the giving of the directions will be paid to the Treasury; and where, in the case of any security payable to bearer which is delivered in pursuance of the said paragraph, any coupons representing any such dividends or interest are not delivered with the security, such reduction in the price payable therefor shall be made as the Treasury think fit:

Provided, That where the price specified in the order or directions in relation to any securities is ex any dividend or ex any interest, this paragraph shall not apply to that dividend or interest or to any coupon representing it.

(5) A certificate signed by any person authorised in that behalf by the Treasury that any specified securities are securities transferred to the Treasury under this Regulation shall be treated by all persons responsible for keeping any registers or books in which the securities are registered or inscribed, or who are otherwise concerned with the registration or inscription of those securities, as conclusive evidence that the securities have been so transferred.

(6) This Regulation shall not apply to any security if the Treasury are satisfied that at all times since the beginning of the twenty-sixth day of August, nineteen hundred and thirty-nine, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom.

(7) Where, by virtue of subparagraph (a) of paragraph (3) of this Regulation, any security has become vested in

the Treasury, then, at any time before the steps required by subparagraph (b) of that paragraph to be taken in relation to that security have been taken, the Treasury may, by a declaration made in writing on their behalf, divest themselves of the security; and thereupon the order or directions in consequence of which the security so became vested in the Treasury shall be deemed, for all purposes, not to have been made or given with respect to that security.

(8) For the purposes of this Regulation, the expression "security" includes a deposit receipt in respect of the deposit of securities.

Restriction on Purchase, Sale, and Loans of Foreign Currency and Gold

2. (1) Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.

(2) In this Regulation the expression "authorised dealer" means, in relation to any transaction in respect of gold, a person authorised by or on behalf of the Treasury to deal in gold, or, in relation to any transaction in respect of foreign currency, a person authorised by or on behalf of the Treasury to deal in foreign currency.

Restriction on Export of Currency, Gold, and Securities, &c.

3. (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury—

(a) Take or send out of the United Kingdom any bank notes, postal orders, gold, securities, or foreign currency, or

(aa) Transfer any security from a register in the United Kingdom to a register outside the United Kingdom, or do any act which is calculated to secure, or forms part of a series of acts which together are calculated to secure, the [fol. 92] substitution, for any security which is either in or registered in the United Kingdom, of a security which is either outside or registered outside the United Kingdom, or

(b) Draw, issue, or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred as consideration—

(i) For receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man, or

(ii) For a right (whether actual or contingent) to receive a payment, or acquire property, outside the United Kingdom and the Isle of Man, or make any payment as such consideration, and the Treasury or a person acting on their behalf may impose such restrictions on the making of payments and the doing of any other acts by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraph (b) of this paragraph.

(2) The preceding paragraph shall not restrict the doing of anything within the scope of his authority by a person authorised by or on behalf of the Treasury to deal in foreign exchange, and shall not restrict the doing of anything which is certified by or on behalf of the Treasury to be necessary for the purpose—

(a) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man, or

(b) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(c) Of defraying reasonable traveling or other personal expenses.

(3) Any person who on any occasion is about to leave the United Kingdom (which person is hereafter in this paragraph referred to as "the traveller") shall, if requested so to do by the appropriate officer—

(a) Declare whether or not he has with him any bank notes, postal orders, gold, securities, or foreign currency;

(b) Produce any bank notes, postal orders, gold, securities, or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search the traveller and examine or search

any article which the traveller has with him, for the purpose of ascertaining whether he has with him any bank notes, postal orders, gold, securities or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency produced or found upon such examination or search unless either—

(i) The appropriate officer is satisfied that the traveller is, in respect of all bank notes, postal orders, gold, securities [fol. 93] ties, or foreign currency which he has with him on the said occasion, exempt from the restriction imposed by subparagraph (a) of paragraph (1) of this Regulation; or

(ii) The traveller produces to the appropriate officer a single certificate granted by, or on behalf of the Treasury, showing, with respect to all bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, that the taking out by him of the banknotes, postal orders, gold, securities, or foreign currency does not involve a contravention of that subparagraph.

Provided, That no female shall be searched in pursuance of this paragraph except by a female.

(4) Nothing in the preceding provisions of this Regulation shall apply in relation to the taking or sending of anything from one part of the United Kingdom to another or from the United Kingdom to the Isle of Man, or in relation to any person travelling between one part of the United Kingdom and another or between the United Kingdom and the Isle of Man.

(5) As respects any goods consigned from the United Kingdom to a destination which is neither in the United Kingdom nor in the Isle of Man, the appropriate officer and any person acting under his directions may examine or search the goods for the purpose of ascertaining whether there are being sent therewith any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency found upon such examination or search unless there appears to the appropriate officer to have been granted by or on behalf of the Treasury a certificate which shows that the sending as aforesaid of the bank notes, postal orders, gold, securities, or foreign currency does not involve a contravention of paragraph (1) of this Regulation.

(6). For the purposes of this Regulation—

(a) Any bills of exchange or promissory notes payable otherwise than in sterling shall be deemed to be foreign currency;

(b) The expression "security" includes a deposit receipt in respect of the deposit of securities;

(c) The expression "transfer" includes transfer by way of loan or security; and

(d) The expression "the appropriate officer" means any officer of Customs and Excise, any immigration officer, any constable or any person authorized by a Secretary of State to act under paragraphs (3) and (5) of this Regulation;

and for the purposes of so much of paragraph (1) of this Regulation as restricts the taking or sending of securities out of the United Kingdom, documents of title relating to [fol. 94] securities shall be deemed to be securities, and references to securities in paragraphs (3) and (5) of this Regulation shall be construed as including references to such documents of title as aforesaid.

Acquisition by Treasury of Gold Coin and Bullion

4. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any gold shall offer that gold, or cause it be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

Provided, That the preceding provisions of this paragraph shall not impose upon any person an obligation to offer any gold for sale or to cause any gold to be offered for sale, if—

(a) He satisfies the Treasury or a person so designated—

(i) That all the persons interested in that gold, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in

the gold under a trust, are not resident in the United Kingdom, or

(ii) That the gold is required for the purpose of performing a contract made before the said day, or

(iii) That the gold is held for the purpose of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man otherwise than by way of dealing in gold, or

(b) He is, in respect of that gold, exempted from this Regulation by the Treasury or by a person so designated.

(1A) Where a person has become bound under paragraph (1) of this Regulation to offer, or cause to be offered, any gold for sale, and has not done so, the Treasury may direct that that gold shall vest in the Treasury, and it shall vest in the Treasury accordingly free from any mortgage, pledge, or charge, and the Treasury may deal with it as they think fit, but the Treasury shall pay to the person who would but for the direction be entitled to possession of the gold such price in respect thereof as may be determined by or on behalf of the Treasury.

(2) The operation of section eleven of the Currency and Bank Notes Act, 1828,³ shall be suspended during the continuance in force of this Regulation.

[fol. 95] Acquisition by Treasury of Certain Foreign Currency, &c.

5. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any foreign currency to which this Regulation applies shall offer it, or cause it to be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

(1A) Where a person has become bound under paragraph (1) of this Regulation to offer, or cause to be offered, any foreign currency for sale, and has not done so, the Treasury may direct that that currency shall vest in the Treasury and it shall vest in the Treasury accordingly

³ 18 & 19 Geo. 5. c. 13.

free from any mortgage, pledge or charge, and the Treasury may deal with it as they think fit, but the Treasury shall pay to the person who would but for direction be entitled to possession of the currency such price in respect thereof as may be determined by or on behalf of the Treasury.

(2) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to assign, or to procure the assignment of, any right to receive outside the United Kingdom and the Isle of Man, in respect of any credit or balance at a bank, payment of any amount in a foreign currency to which this Regulation applies, shall, unless the Treasury or a person designated by the Treasury for the purposes of this Regulation gives him notice to the contrary, do all things necessary for the purpose of assigning that right to the Treasury or to a person so designated.

The sum payable as consideration for any assignment made in accordance with this paragraph shall be such as may be determined by or on behalf of the Treasury.

(3) The preceding provisions of this Regulation shall not impose upon any person an obligation in respect of any currency or right to receive payment of any amount, if—

(a) He satisfies the Treasury or a person designated by the Treasury for the purposes of this Regulation that all the persons interested in that currency or right, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in the currency or right under a trust, are not resident in the United Kingdom, or

(b) He satisfies the Treasury or a person so designated that the currency or amount, as the case may be, is held or is required for the purpose—

[fol. 96] (i) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(ii) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle

of Man otherwise than by way of dealing in foreign exchange, or

(iii) Of defraying reasonable travelling or other personal expenses, or

(c) He is, in respect of that currency or right, as the case may be, exempted from this Regulation by the Treasury or by a person so designated.

(4) The foreign currency to which this Regulation applies is such foreign currency as may from time to time be designated by the Treasury for the purposes of this Regulation by notice published in the London, Edinburgh, and Belfast Gazettes.

(5) Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view of facilitating the enforcement of the Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this Regulation applies or not) by reason of the export of goods.

Without prejudice to any liability to penalties under Part V of the Defense Regulations, 1939,⁴ any such declaration shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act of 1876⁵ (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the Customs; and if any goods in respect of which a declaration has been required under this paragraph to be delivered are shipped, put off, or water-borne to be shipped, without the declaration having been delivered in accordance with this paragraph, the goods shall be liable to forfeiture under the enactments relating to the Customs.

⁴ S. R. & O., 1939, No. 927.

⁵ 39 & 40 Vict., c. 36.

General Power to Exempt Securities

5A. (1) Without prejudice to any power conferred on the Treasury by any of the preceding provisions of these Regulations, the Treasury, by an order made by them generally with respect to any description of securities, or by [fol. 97] a certificate given by them or on their behalf with respect to any particular securities, may exempt the securities to which the order or certificate relates from the provisions of Regulations one to five of these Regulations.

(2) An order or certificate under the preceding paragraph shall be deemed to relate not only to the securities specified in the order or certificate, but also to any security to which the owner of securities so specified may become or has become entitled as such, either by way of bonus or in consequence of any conversion operation, amalgamation or reconstruction.

(3) Nothing in any order under paragraph (1) or paragraph (2) or in paragraph (3) of Regulation one of these Regulations, and nothing in Regulation three of these Regulations, shall apply in relation to any security to which an order or certificate under this Regulation relates, and nothing in Regulation five of these Regulations shall apply in relation to any amount of currency which an owner of any such security has become entitled as such to receive.

(4) Any order or certificate made or given by the Treasury under Regulation one of the Defence (Finance) (No. 2) Regulations, 1939, before the twenty-third day of November, nineteen hundred and thirty-nine, shall be deemed for the purposes of these Regulations to be an order or certificate made or given under this Regulation.

(5) For the purposes of this Regulation, the expression "security" includes a deposit receipt in respect of the deposit of securities.

Control of Capital Issues

6. (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful except with the consent of the Treasury and in accordance with such conditions as the Treasury may impose, to make an issue

of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who—

(a) Issues any securities (whether for cash or otherwise), or

(b) Receives any money on loan on the terms, or in the expectation, that the loan will or may be repaid wholly or partly by the issue of any securities, or by the transfer of any securities issued after the making of the loan.

[fol. 98] (4) A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions.

(5) In this Regulation, references to securities and to the issue of securities respectively include, as from the twenty-third day of November, nineteen hundred and thirty-nine, references to any mortgage or charge, whether legal or equitable, and to the creation of, or the increasing of the amount secured by, any such mortgage or charge; and the expression "security" includes a promissory note of a local authority and a deposit receipt for money lent issued by a local authority or by any person carrying on any business other than the business of banking.

(6) In the application of this Regulation to Scotland any reference to a mortgage shall include a reference to a heritable security.

Exemption From Stamp Duty

7. (1) Stamp duty shall not be chargeable on any security by reason only of the assignment, transfer or negotiation thereof to the Treasury, and shall not be chargeable—

(a) On any instrument whereby any security is assigned or transferred to the Treasury (whether on sale or otherwise), or

(b) On any contract note for, or relating to, any sale of securities to the Treasury.

(2) This Regulation applies only in relation to assignments, transfers, negotiations or sales of securities effected during the continuance in force of this Regulation, whether in compliance with these Regulations or otherwise.

(3) In this Regulation the expression "contract note" has the meaning assigned to that expression by subsection (3) of section seventy-seven of the Finance (1909-10) Act, 1910.^a

Power to Obtain Information

8. Without prejudice to any special provision contained in these Regulations, the Treasury, any person authorised by or on behalf of the Treasury, or any officer of Customs and Excise may, for the purposes of securing compliance with these Regulations, give to any person directions requiring him, within such time, in such manner and to such persons as may be specified in the directions, to furnish [fol. 99] such information as may be so specified and produce for inspection any relevant books, accounts or other documents.

Application of Certain Provisions of Defence Regulations, 1939

9. The provisions of Part V of the Defence Regulations, 1939, shall apply for the purpose of the enforcement of these Regulations, and otherwise in relation thereto, as if any reference in the said Part V to those Regulations included a reference to these Regulations:

Provided, That any thing which is in the possession of an executive authority, as defined by Regulation ninety-four

^a 10 Edw. 7 & 1 Geo. 5, c. 8.

of the Defence Regulations, 1939, by reason of its having been seized, whether before or after the twenty-third day of November, nineteen hundred and thirty-nine, under Regulation three of these Regulations may, instead of being dealt with under the said Regulation ninety-four, be dealt with in accordance with directions of the Treasury, and where any such thing is so dealt with the Treasury shall, on the application, in the case of a seizure under paragraph (3), of the person from whom the thing was seized, and, in the case of a seizure under paragraph (5), of the person making entry of the goods in question, pay to him such price as appears to the Treasury to have been the market value thereof at the time of the seizure.

Provision as to Payments by Treasury

9A. Nothing in the preceding provisions of these Regulations relating to the payment of any price by the Treasury shall be construed as requiring the Treasury to pay that price otherwise than in sterling or otherwise than in the United Kingdom.

Interpretation

10. In these Regulations, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

“Bank notes” means bank notes which are legal tender in the United Kingdom or in any part thereof;

“Foreign currency” means any currency other than sterling;

“Gold” means gold coin or gold bullion;

“Immigration officer” means an immigration officer for the purposes of the Aliens Order, 1920;⁷

“Owner,” in relation to any security, includes any person who has power to sell or transfer the security, or who has the custody thereof, or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon, or who has any other interest therein; and

“Security” includes shares, stock, bonds, notes, debentures, debenture stock, and Treasury bills, but does not

⁷ S. R. & O. 1920 (No. 448) I, p. 138.

include a bill of exchange or, save as otherwise expressly provided, a promissory note or a deposit receipt.

Short Title

11. These Regulations may be cited as the Defence (Finance) Regulations, 1939.

This Order may be cited as the Defence (Finance) Regulations Amendment (No. 2) Order, 1939.

The Defence (Finance) (No. 2) Regulations, 1939,^{*} are hereby revoked.

Rupert B. Howorth.

EXHIBIT No. 4

Statutory Rules and Orders

1940 No. 291 Emergency Powers (Defence) Finance
Order in Council Adding Regulation 5B to the Defence
(Finance) Regulations, 1939

At the Court at Buckingham Palace, the 7th day of March
1940 Present, the King's Most Excellent Majesty in Coun-
cil 2 & 3 Geo. 6, c. 62.

His Majesty, in pursuance of section one of the Emer-
gency Powers (Defence) Act, 1939, and of all other powers
enabling Him in that behalf is pleased, by and with the
advice of His Privy Council, to order, and it is hereby or-
dered, that after Regulation five A of the Defence (Finance)
Regulations, 1939¹, the following Regulation shall be in-
serted:

Requirement that certain goods exported shall be paid for
in Specified Foreign Currency

5B. (1) Subject to any exemptions which may be granted
by order of the Treasury, no person shall, except with per-
mission granted by or on behalf of the Treasury, export
goods of any class or description specified in paragraph
[fol. 101] (2) of this Regulation to a destination in any of

^{*} S. R. & O. 1939 No. 1251.

¹ See S. R. & O., 1939, No. 1620.

the territories specified in paragraph (3) of this Regulation, unless it is shown to the satisfaction of the Commissioners of Customs and Excise—

(a) That payment for the goods has been made to a person resident in the United Kingdom either in one of the currencies specified in paragraph (4) of this Regulation or with sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorized dealer within the meaning of Regulation two of these Regulations, by a payment in one of those currencies; or

(b) That payment for the goods is to be so made not later than six months, or such longer period as may be allowed by or on behalf of the Treasury, after the date of export;

and in either case that the amount of the payment for the goods represents the full value of the goods, subject to such deductions, if any, as may be allowed by or on behalf of the Treasury.

(2) The classes and descriptions of goods referred to in paragraph (1) of this Regulation are as follows:

Whisky.

Dressed and undressed fur skins and pieces thereof (including Persian lamb skins and pieces thereof).

The manufactures of fur skins (including Persian lamb skins) known as strips and plates.

Tin ore and concentrates.

Tin in the form of blocks, ingots, bars, and slabs.

Raw rubber (including crepe).

Rubber latex.

Reclaimed rubber.

Raw jute.

Jute yarns.

Jute fabrics of any width, shape, or length (other than carpets, carpeting and floor rugs, floor mats, and matting).

Jute sheets, wrappers, gunnies, sacks, and bags, not in actual use as coverings, receptacles or bindings for other goods.

(3) The territories referred to in the said paragraph (1) are as follows:

(a) All territories in or adjacent to the continent of America, with the exception of—

(i) Canada, Newfoundland, and any other part of His Majesty's dominions.

(ii) The Argentine Republic.

(iii) Any dependency of the French Republic.

(b) The Philippine Islands and all territories under the sovereignty of the United States of America.

[fol. 102] (c) Belgium, the Belgian Congo, and Ruanda-Urundi.

(d) The Netherlands and the Netherlands East Indies.

(e) Switzerland.

(4) The currencies referred to in the said paragraph (1) are as follows:

Belgas.

Guilders.

Netherlands East Indian guilders.

Swiss francs.

United States dollars.

(5) The Treasury may by order add to, or subtract from, the classes and descriptions of goods, the territories, and the currencies mentioned in the three last preceding paragraphs and otherwise amend the said paragraphs, and references in paragraph (1) of this Regulation to the classes and descriptions of goods, the territories, and the currencies specified in those paragraphs shall be construed accordingly.

(6) For the purpose of enforcing this Regulation and of satisfying themselves, in the case of any goods, as to the matters specified in paragraph (1) of this Regulation, the Commissioners of Customs and Excise may require the person making entry of the goods to deliver to the collector or other proper officer, together with the entry, such declarations and undertakings signed by such persons as the Commissioners may require, and where any such declaration or undertaking has been so required, the goods shall not be exported until it has been delivered as aforesaid.

(7) Without prejudice to any liability to penalties under Part V of the Defence (General) Regulations, 1939²—

(a) If any goods are exported in contravention of the provisions of this Regulation or are shipped, put off, or water-borne to be shipped for the purpose of being so exported, the goods shall be liable to forfeiture under the enactments relating to the customs; and

39 & 40 Vict., c. 36

(b) Any declaration required to be delivered under paragraph (6) of this Regulation shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act, 1876 (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the customs.

(8) References in this Regulation to the destination of any goods include references to the ultimate destination thereof.

(9) This Regulation shall come into force on the twenty-fifth day of March, nineteen hundred and forty."

Rupert B. Howorth.

[fol. 103]

EXHIBIT No. 5

Statutory Rules and Orders

1940 No. 892 Emergency Powers (Defence) Finance

Order in Council Adding Regulation 3C to, and Amending Regulation 5B of, the Defence (Finance) Regulations, 1939

At the Court at Buckingham Palace, the 7th Day of June,
1940

Present, the King's Most Excellent Majesty in Council.
His Majesty, in pursuance of the Emergency Powers (Defence) Acts, 1939 and 1940, and of all other powers enabling Him in that behalf, is pleased, by and with the ad-

² S. R. & O., 1939, No. 927.

vice of His Privy Council, to order, and it is hereby ordered as follows:

1. After Regulation three B of the Defence (Finance) Regulations, 1939, there shall be inserted the following Regulation:

Payments; &c., to Persons Resident in Certain Territories

3C. (1) Save as is provided in this Regulation, no person shall draw, issue, or negotiate any bill of exchange or promissory note or acknowledge any debt so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred in favour of a person who is resident in any territory specified in an order of the Treasury in that behalf or make any payment to any such person: *Provided*, That this Regulation shall have effect subject to such exemptions, if any, as may be granted by order of the Treasury and shall not prevent the doing of any act for which permission has been granted by or on behalf of the Treasury.

(2) Any person who is desirous of carrying out any such transaction as is mentioned in paragraph (1) of this Regulation may, with permission granted by or on behalf of the Treasury and subject to any conditions which may be imposed by or on behalf of the Treasury, make a payment in sterling to the credit of such a special account as is hereinafter mentioned, that is to say—

(a) If the territory specified in the order is declared by the order to be a territory with respect to which an agreement is in force for the regulation of payments between the United Kingdom and that territory, a special account recognised for the purposes of this Regulation by the Bank of England as an account established under the agreement.

(b) If the territory specified in the order is not declared by the order to be such a territory as aforesaid, the Treasury special account, that is to say, such account, being an [foreign] account in the name of the Treasury, as may be designated by or under the order as the Treasury special account for that territory.

(3) Where a payment is made to the credit of a Treasury special account under this Regulation, the receipt of the Treasury or a person authorized by the Treasury for the

sum paid shall, to the extent of the sum paid, be a good discharge to the person from whom the debt was due: *Provided*, That where the debt is not in sterling the extent of the discharge shall be ascertained by converting the amount paid into the currency in which the debt was payable at such rate of exchange as the Treasury may determine.

(4) The amount standing to the credit of any Treasury special account shall from time to time as the Treasury may direct be applied in accordance with any agreement made for the regulation of payments between the United Kingdom and the territory in question or, if no such agreement is made, for the purpose of paying, in whole or in part and in such order and at such times as the Treasury thinks fit, debts due from persons resident in the territory in question to persons resident in the United Kingdom or in such other territories as may be specified in an order of the Treasury in that behalf.

(5) The power conferred by paragraph (1) of Regulation three of these Regulations on the Treasury or a person acting on their behalf to impose such restrictions on the making of payments and the doing of any other acts by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraphs (a) and (b) of that paragraph shall apply in relation to the due enforcement of this Regulation as it applies in relation to the due enforcement of those subparagraphs.

2. Regulation five B of the Defence (Finance) Regulations, 1939, shall be amended as follows:

(a) For paragraph (1) there shall be substituted the following paragraph:

“(1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury, export goods of any class or description to a destination in any territory to which this Regulation is applied by order of the Treasury, unless it is shown to the satisfaction of the Commissioner of Customs and Excise—

(a) That payment for the goods has been made to a person resident in the United Kingdom in such manner as may be prescribed in relation to the territory in question;

(b) That payment for the goods is to be so made not later than six months, or such longer period as may be allowed by or on behalf of the Treasury, after the date of export;

[fol. 105] and in either case that the amount of the payment of the goods represents the full value of the goods, subject to such deductions, if any, as may be allowed by or on behalf of the Treasury."

(b) Paragraphs (2) to (5) and paragraph (9) shall be revoked;

(c) Paragraphs (6), (7), and (8) shall be renumbered as paragraphs (2), (3), and (4); and in subparagraph (b) of the said paragraph (7), for the words "paragraph (6) of this Regulation," there shall be substituted the words "paragraph (2) of this Regulation;" and

(d) For the marginal note there shall be substituted the following marginal note:

"Requirements as to payment for goods exported to certain territories."

3. (1) This Order shall come into force on the 10th day of June 1940.

(2) Proceedings in respect of a contravention, before the tenth day of June, nineteen hundred and forty, of Regulation five B of the Defence (Finance) Regulations, 1939, may be instituted, and any punishment imposed in any such proceedings may be enforced, as if this Order had not been made.

Rupert B. Howorth.

Statutory Rules and Orders

1940 No. 892 Emergency Powers (Defence) Finance

Order in Council Adding Regulation 3C to, and Amending Regulation 5B of, the Defence (Finance) Regulations, 1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1d. net.

Statutory Rules and Orders

1940 No. 894 Emergency Powers (Defence) Finance—
Export of Goods

The Defence (Finance) (Export of Goods) (No. 1) Order, 1940. Dated June 7, 1940

The Treasury, in pursuance of their powers under paragraph (1) of Regulation 5B of the Defence (Finance) Regulations, 1939,³ and of all other powers enabling them in that behalf, hereby make the following Order:

1. The said Regulation 5B shall apply to the territories specified in the first column of the Schedule to this Order, and for the purposes of subparagraphs (a) and (b) of paragraph (1) of that Regulation, the prescribed manner of payment for goods exported to a destination in any of the said territories shall be the manner specified in relation to that territory in the second column of the said Schedule.

2. This Order may be cited as the Defence (Finance) (Export of Goods) (No. 1) Order, 1940.

3. This Order shall come into operation on the tenth day of June, 1940.

Dated this seventh day of June 1940.

James Stuart, Patrick Buchan-Hepburn, Two of the
Lords Commissioners of His Majesty's Treasury.

³ See S. R. & O., 1940, Nos. 291 and 892.

Schedule

Territories to which Regulation 5B applies	Prescribed manner of payment for goods
The United States of America, the Philippine Islands, and all territories under the sovereignty of the United States of America.	United States dollars, or sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorised dealer within the meaning of Regulation 2 of the Defence (Finance) Regulations, 1939, by a payment in United States dollars.
Switzerland	Swiss francs, or sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorised dealer within the meaning of Regulation 2 of the Defence (Finance) Regulations, 1939, by a payment in Swiss francs.
Sweden	Swedish kronor, or sterling funds obtained from a Swedish special account for the purposes of Regulation 3C of the Defence (Finance) Regulations, 1939.

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway; London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1d. net.

[fol. 107]

EXHIBIT No. 6

Federal Reserve Bank of New York

March 19, 1940.

DEAR MR. SECRETARY:

From advices which we have received from London, we understand that under the Defence (Finance) Regulation Amendment Order, 1939, of the Government of the United Kingdom, from and after March 25, 1940, exchange proceeds in designated currencies, including United States dollars, derived from specified exports from the United Kingdom to certain countries including the United States, the Philippine Islands and all territories under the sovereignty of the United States, must, in effect, be sold to authorized banks for surrender to the Bank of England at such rate of exchange as may be fixed from time to time by or on behalf of the British Treasury, or such exports must be paid for in pounds sterling purchased at such fixed rate of exchange with one of such designated currencies.

In view of the foregoing, we shall, commencing Monday, March 25, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the pound sterling, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by or on behalf of the British Treasury, at present \$4.03½ United States currency per pound sterling.

We understand that under the foreign exchange control orders of the Canadian Government currently in effect, proceeds of United States dollar exchange derived from exports from Canada must be sold to an authorized dealer at rates fixed from time to time by the Canadian Foreign Exchange Control Board; or, if such exports are paid for in Canadian dollars, such Canadian dollars must be purchased from authorized dealers at such rates with United States dollars, provided, however, that in instances where specific permission is granted by the Exchange Control Board, the Canadian exporter may accept, in payment of the purchase price of the exports, Canadian dollars purchased at the free rate.

In view of the foregoing, we shall, commencing Friday, March 22, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the Canadian dollar, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by the Canadian Foreign Exchange Control Board, at present \$0.9090+ United States currency per Canadian dollar.

[fol. 108] We understand that the situation respecting foreign exchange controls existing in Newfoundland in respect of the Newfoundland dollar is comparable to the situation existing in Canada with respect to the Canadian dollar. In the circumstances, we shall, commencing Friday, March 22, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the Newfoundland dollar, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by the Newfoundland Foreign Exchange Control Board, at present \$0.9090+ United States currency per Newfoundland dollar.

As you know, it has been our practice, since 1922, to make available, with the consent of the Treasury Department, to the press and public the foreign exchange rates which this bank has certified daily to the Secretary of the Treasury. In the absence of instructions from the Treasury Department to the contrary, we will assume that the Treasury Department wishes us to continue this practice on and after March 22, 1940, in the case of the Canadian and Newfoundland dollar, and on and after March 25, 1940, in the case of the pound sterling.

Faithfully yours, L. W. Knoke, Vice President.

Honorable Henry Morgenthau, Jr., Secretary of the Treasury, Washington, D. C.

EXHIBIT No. 7

Federal Reserve Bank of New York

Date, May 3, 1940.

The Honorable the Secretary of the Treasury.

Sir:

In pursuance of the provisions of Section 522 of the Tariff Act of 1930, dealing with the conversion of foreign currency for the purpose of the assessment and collection of duties upon merchandise imported into the United States, we have ascertained and hereby certify to you that the buying rates in the New York Market at noon today for cable transfers payable in the foreign currencies are as shown on the reverse side. •

Respectfully, Per pro D. J. Liddy, Foreign Department.

[fol. 109]

Values of foreign currencies

[Value in U. S. dollars]

Country	Monetary unit	Noon buying rate for cable transfers in New York
Europe:		
Belgium	Belga	168012.
Bulgaria	Lev	(¹).
Czecho-Slovakia	Koruna	(¹).
Denmark	Krone	(¹).
England	Pound Sterling	4.035000 Official.
England	Pound Sterling	3.475138 Free.
Finland	Markka	017666.
France	Franc	019689.
Germany	Reichsmark	² 401133.
Greece	Drachma	² 006607.
Hungary	Pengo	² 175830.
Italy	Lira	050457.
Netherlands	Guilder	530781.
Norway	Krone	(¹).
Poland	Zloty	(¹).
Portugal	Escudo	033675.
Roumania	Leu	(²).
Spain	Peseta	² 091304.
Sweden	Krona	238125.
Switzerland	Franc	224138.
Yugoslavia	Dinar	² 022440.
Asia:		
China	Chefoo Dollar (Yuan)	(¹).
China	Hankow Dollar (Yuan)	(¹).
China	Shanghai Dollar (Yuan)	² 043787.
China	Tientsin Dollar (Yuan)	(¹).
Hong Kong	Dollar	215000.
India (British)	Rupee	301721.
Japan	Yen	234383.
Straits Settlements	Dollar	471356.
Australasia:		
Australia	Pound	3.228000 Official.
Australia	Pound	² 768125 Free.
New Zealand	Pound	2.779166.
Africa:		
Union of South Africa	Pound	3.980000.
North America:		
Canada	Dollar	909090 Official.
Canada	Dollar	844464 Free.
Mexico	Peso	² 166575.
Newfoundland	Dollar	909090 Official.
Newfoundland	Dollar	842291 Free.
South America:		
Argentina	Peso	² 297733.
Brazil	Milreis	² 060575 Official.
Brazil	Milreis	² 050333 Free.
Chile	Peso	² 051650 Official.
Chile	Peso	² 040000 Export.
Colombia	Peso	² 569850.
Uruguay	Peso	² 658300 Controlled.
Uruguay	Peso	² 389500 Noncontrolled.

¹ No rates available.² Nominal rate.³ Temporarily omitted.

EXHIBIT No. 8

Re Section 522 (c) of the Tariff Act of 1930

[Value in U. S. dollars]

Country	Monetary unit	Noon buying rate for cable transfers in New York
Europe:		
Belgium	Belga	168012.
Bulgaria	Lev	No rates available.
Czecho-Slovakia	Koruna	No rates available.
Denmark	Krone	No rates available.
England	£ Sterling	4. 035000 Official.
Finland	£ Sterling	3. 475138 Free.
France	Markka	017666.
Germany	Franc	019689.
Greece	Reichsmark	401133. ¹
Hungary	Drachma	006607. ¹
Italy	Pengo	175830. ¹
Netherlands	Lira	050457.
Norway	Guilder	530781.
Poland	Krone	No rates available.
Portugal	Zloty	No rates available.
Roumania	Escudo	033675.
Spain	Leu	Temporarily omitted.
Sweden	Peseta	091304. ¹
Switzerland	Krona	238125.
Yugoslavia	Franc	224138.
	Dinar	022440. ¹
Asia:		
China	Chefoo Yuan \$	No rates available.
China	Hankow Yuan \$	No rates available.
China	Shanghai Yuan \$	043787. ¹
China	Tientsin Yuan \$	No rates available.
Hong Kong	Dollar	215000.
India (British)	Rupce	301721.
Japan	Yen	234383.
Straits Settlements	Dollar	471356.
Australasia:		
Australia	Pound	3. 228000 Official.
Australia	Pound	2. 768125 Free.
New Zealand	Pound	2. 779166.
Africa: Union of So. Africa.		
	Pound	3. 980000.
N. America:		
Canada	Dollar	909090 Official.
Canada	Dollar	844464 Free.
Mexico	Peso	166575. ¹
Newfoundland	Dollar	909090 Official.
Newfoundland	Dollar	842291 Free.
S. America:		
Argentina	Peso	297733. ¹
Brazil	Milreis	060575 Official.
Brazil	Milreis	050333 Free. ¹
Chile	Peso	051650 Official. ¹
Chile	Peso	040000 Export. ¹
Colombia	Peso	569850. ¹
Uruguay	Peso	658300 Controlled. ¹
Uruguay	Peso	389500 Noncontrolled. ¹

¹ Nominal rate.

Circulated by the Customs Information Exchange, New York, N. Y.

HA: edw

5/4/40.

May 3, 1940.

[vol. 111]

EXHIBIT No. 10

Statutory Rules and Orders

1940 No. 689 Emergency Powers (Defence) Finance

The Payment for Exports (Control) (No. 1) Order, 1940, dated May 9, 1940, made by the Treasury under Regulation 5B of the Defence (Finance) Regulations, 1939.

The Treasury, in pursuance of their power under paragraph (5) of Regulation 5B of the Defence (Finance) Regulations, 1939¹ (which requires that certain goods exported shall be paid for in certain foreign currencies mentioned in the said Regulation) and of all other powers enabling them in that behalf, hereby make the following Order:

1. There shall be added to the classes and descriptions of goods mentioned in paragraph (2) of the said Regulation 5B the goods specified in the Schedule to this Order.

2. In accordance with the foregoing article the said paragraph (2) shall be amended by inserting after the word "whisky" the words contained in the Schedule to this Order.

3. This Order may be cited as the Payment for Exports (Control) (No. 1) Order, 1940, and shall come into force on the 20th May, 1940.

Dated this ninth day of May 1940.

W. W. Boulton, Patrick Buchan-Hepburn, Two of the Lords Commissioners of His Majesty's Treasury.

Schedule

Diamonds rough and diamonds advanced in condition from their rough state by any process, but not including dies (whether mounted or not) of diamond, tools and tool parts of which the cutting edge is tipped with diamond, or diamonds mounted or set in jewellery of precious metal.

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Sta-

¹ See S. R. & O. 1940, No. 291.

tionery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1*d.* net.

[fol. 112] IN UNITED STATES CUSTOMS COURT

(C. D. 801)

JOHN BARR

v.

UNITED STATES

Protest 57467—K1584 against the decision of the collector of customs at the port of New York

DECISION—July 30, 1943

EKWALL, Judge: The question involved in this case is the proper rate at which the currency of the invoice of certain imported goods should be converted into United States dollars under the provisions of section 522 (c) of the Tariff Act of 1930. The merchandise consists of wool cloth manufactured in Scotland and exported to this country on May 3, 1940, under an invoice made out in pound sterling. For the purpose of assessment of the ad valorem duty upon this wool cloth it was necessary for the collector of customs at the port of entry to convert the pounds sterling to United States currency.

On the date of exportation the Federal Reserve bank, acting under authority of section 522 (c) of said Tariff Act of 1930, determined and certified to the Secretary of the Treasury two buying rates for pounds sterling, viz, an "official" rate of \$4.035 and a "free" rate of \$3.475138. The collector of customs, acting under instructions of the Secretary of the Treasury (T. D. 50134), used the "official" or "controlled" rate and it is the contention of the plaintiff herein that he should have adopted the "free" rate noted above. In this connection it may be noted here that the term "official" applies to the rate fixed by the British

Government and does not signify official action of the Government of the United States.

Section 522, *supra*, provides as follows:

Sec. 522. Conversion of Currency.

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—Section 25 of the Act of August 27, 1894, entitled "An Act of reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows.

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quaterly on the 1st day of January, April, July, and October in each year."

(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after [fol. 113] the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public

at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

The facts have been submitted upon a stipulation accompanied by certain documentary exhibits. The Government produced three witnesses. The relevant stipulated facts may be summarized as follows. Under the Defence (Finance) Regulations, 1939, beginning September 3, 1939, there were adopted by the United Kingdom certain regulations affecting the internal control of currency. The first of these required that all persons resident in the United Kingdom who at the time the regulation went into effect possessed or thereafter acquired any foreign currency, should offer it or cause it to be offered for sale to the Treasury at a price (rate of exchange) determined by the Treasury. By amendment to the last-named provision, under date of September 21, 1939, it was provided as follows:

Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view to facilitating the enforcement of this Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this Regulation applies or not) by reason of the export of goods.

It was further provided that exchanges of certain foreign currency (including United States dollars) and pounds sterling in the United Kingdom should be made only through the Bank of England or an "authorized dealer." Statutory Rules and Orders 1939 No. 1251, Emergency Powers (Defence) Finance. (Exhibit 2.)

[fol. 114] On November 23, 1939, there was promulgated an order directing that

Except with permission granted by or on behalf of the Treasury, no person other than an authorized dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer. [Statutory Rules and Orders 1939 No. 1620 Emergency Powers (Defence) Finance. Exhibit 3.]

This currency control on the part of Great Britain was effective only within the United Kingdom and not until March 25, 1940 did the British Government by specific regulation extend its currency control to this country. Under the Order in Council of March 7, 1940, effective on March 25 [Statutory Rules and Orders 1940 No. 291 Emergency Powers (Defence) Finance. Exhibit 4], payment for certain enumerated exports to the United States was required to be made in either United States dollars or pounds sterling purchased in the United Kingdom from the Bank of England or an agent of such bank at the fixed British "official" rate of exchange. However, this order did not apply to woolen goods of the character of those here involved.

At all times prior to March 25, 1940, the Federal Reserve bank of New York certified daily to the Secretary of the Treasury one buying rate for the pound sterling. Beginning on that date the Federal Reserve bank began to certify under section 522 (c), *supra*, two rates of exchange, one of which was designated "free," and the other "official," the latter being the rate fixed by or on behalf of the British Treasury. As above stated, the rates determined by the Federal Reserve bank and certified to the Secretary of the Treasury for May 3, 1940, the date of exportation in this case, were an "official" rate of \$4.035 and a "free" rate of \$3.475138. The Secretary instructed collectors to use the "official" rate and published that rate only.

It is contended on the part of the plaintiff herein that under section 522 (c), *supra*, determination of buying rates by the Federal Reserve bank is final and conclusive and the Secretary of the Treasury has no discretionary power to vary, set aside, or nullify such determination. The Government contends that the said section contemplates the determination, certification, publication, and use of only

one buying rate for each single currency; therefore, it alleges, the determination and certification of two rates for May 3, 1940, was improper and the Secretary of the Treasury should either (1) have rejected both rates or (2) have determined which certified rate was proper.

A reading of the statute involved bears out the plaintiff's argument. It states in plain unambiguous language that the buying rate "shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury." It further provides that the Secretary of the Treasury "shall make it public at such times and to such extent as he deems necessary." Nothing in the language quoted can by any stretch of the imagination be interpreted as conferring power upon the Secretary to accept or reject any rate, or to make any determination as to whether the rate is or is not proper. The only authority given the Secretary is to make such determination public and in this he is given discretion as to the time and extent of the publication. On the question of the use of the singular noun as denoting that only one buying rate is contemplated and that the certification of two rates was improper, it is a well-known rule in construction of statutes that when it is necessary to give effect to the legislative intent, words importing the singular only will be applied to the plural of person and things. (*See* 36 Cyc. 1123, 1.)

It is the duty of the court in interpreting the law to endeavor insofar as possible to carry out the will and intent of the lawmakers. In so doing we must endeavor to arrive at the object to be attained. The purpose of laws imposing ad valorem duties on imported merchandise has always been to take as the basis upon which duties are to be computed the true value of the goods in the country which produced them or in which they were obtained, such value to be ascertained by the actual purchase price or by the market value as a basis. To this end the various revenue laws have from time to time introduced new provisions in order that collectors may fix the foreign value correctly and in order that duties shall be uniform. The regulation by statute of the value of foreign currencies is designed to accomplish that purpose. Where the value of merchandise is expressed on the invoice in depreciated currency the various statutes have provided a method of determining whether the assumed value of the foreign currency remains unchanged and whether the actual value

corresponds with the nominal value, in order to carry out the intention of Congress by keeping the fluctuations of nominal values to the standard of specie values.

In very early times the value of foreign coins was fixed by statute and was based upon their pure metal value as expressed in money of account of the United States. By the act of March 3, 1873, all prior acts were repealed and a general law was substituted whereby it was provided that the value of foreign coins should be that of the pure metal, declared annually by the Director of the Mint, and proclaimed by the Secretary of the Treasury. By the act of August 27, 1894, Congress for the first time took cognizance of an alternative basis for the conversion of foreign currencies, and in the proviso to section 25 of that act the Secretary of the Treasury was permitted to order the reliquidation of an entry at a value different from that of the pure metal value of the foreign coin "whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred." Thus for the first time the Secretary of the Treasury was empowered to determine the exchange rate and his determination thereunder was held to be conclusive. *United States v. Whitridge*, 197 U. S. 135, 49 L. ed. 696.

In the Emergency Tariff Act of 1921 (section 403), the method of determining foreign exchange values was revised and in place of the discretionary power theretofore granted to the Secretary of the Treasury the determination of the values of foreign currencies was placed in the Federal Reserve Bank of New York. The Court of Customs Appeals (now the Court of Customs and Patent Appeals) in the case of *Fry & Friedsam v. United States*, 12 Ct. Cust. Appls. 486, T. D. 40694, had occasion to discuss this revision and the reasons therefor. We quote from their decision as follows:

It will be observed that section 403 of the emergency tariff act of May 27, 1921, purports to be, and is, a complete revision of said section 25; that said section 25 is repeated without material change until that portion of said section is reached in and by which a method is provided for as-

certaining foreign exchange values. That portion of said section is omitted from section 403 of the act of May 27, 1921, and is therefore repealed. In lieu of the method provided by said section 25, a new method of ascertainment of the value of foreign currency is provided, namely, a determination by the Federal Reserve Bank of New York, which shall be certified daily to the Secretary of the Treasury, and which said valuation as to any importation shall be effective at noon on the day of exportation.

It is evident this change in our method of fixing foreign currency values was brought about by the violent fluctuations in the values of foreign currency during the period immediately following the World War, and which existed at the time of the enactment of said emergency tariff act of 1921. By said section 25, cumbersome and slowly moving machinery was provided by which, on special occasions, and upon the production of "satisfactory evidence," the Secretary of the Treasury might ascertain and fix a different exchange value from that proclaimed by him for the quarter. By said section 403, for purposes of celerity and dispatch, a departure from the proclaimed exchange rate may be had when "the value so proclaimed varies by 5 per centum or more," a fact which obviously must be found in the first instance by the collector.

Said section 403 was reenacted as section 522 of the Tariff Acts of 1922 and 1930.

In view of this change in procedure in 1921 the contention of the Government that the Secretary of the Treasury had the power to either reject both rates certified by the Federal Reserve bank in the instant case or to determine which of the two rates was proper, is without merit. The Secretary's power is merely the ministerial one of pro-[fol. 117] claiming the estimated value. It is the opinion of the court that when the Federal Reserve Bank on the date of exportation of the instant merchandise, viz. May 3, 1940, certified two buying rates for pounds sterling, one denominated "free" and the other "official" it was the duty of the Secretary, under section 522 (c), *supra*, to publish both rates.

Nowhere in said section 522 (c) is the Secretary empowered to determine the legal rate of exchange. The certification of the Federal Reserve bank leaves no discretion on the part of the Secretary as to whether he shall

accept the rate or rates. It is true that under the general powers granted him over collectors of customs he could direct that either one of two rates certified should be used, but such instruction would not preclude judicial inquiry in order to determine which of the two rates certified was applicable.

We are not unmindful of the holding of the Supreme Court of the United States in the case of *Hadden v. Merritt*, 115 U. S. 25, 29 L. ed. 333, that alleged errors in the estimate of the value of foreign coins could not be shown in judicial proceedings to affect the rights of the Government or individuals. The question here presented is not an alleged error in the estimate of the value of the foreign currency, but the correctness of the action of the collector in selecting one of two rates estimated and certified by the Federal Reserve bank. The collector is the official charged with the duty of converting currency and he must look to the statute for his authority. Even where conversion was made under the order of the Secretary, as is the case here, such action has been held to be that of the collector and not the Secretary. See *United States v. Parkhurst & Co. et al.*, 12 Ct. Cust. Appls. 370, T. D. 40522, and *United States v. Lucius Beebe & Sons*, 122 Fed. 762.

The motion of Government counsel to dismiss this case on the ground that it presented no question over which this court had jurisdiction was denied, primarily because it was the opinion of the court that the ends of justice would best be served if the case were presented on the merits at which time the court would be in possession of all the facts and would be in a better position to decide the jurisdictional question. In view of what we have said above it is the opinion of the court that the questions presented are justiciable and that the motion was properly denied.

The court having decided that the Secretary's action in directing which of the rates certified ~~was to be~~ used by collectors of customs without regard to the circumstances of the importation or to the law of the country of export, was beyond the scope of his powers, we must look to the action of the collector and determine which of the rates certified and made public is applicable in the case before us. On May 3, 1940, the date of exportation of the instant [fol. 118] merchandise, this wool cloth was not covered by the Order in Council in effect at that time, requiring pay-

ments for certain exports to the United States to be made in either United States dollars or pounds sterling purchased in the United Kingdom from the Bank of England or an agent of such bank at the fixed British "official" rate of exchange. Therefore the action of the Secretary of the Treasury in arbitrarily directing the collector to select the "official" rate in converting the currency of the invoice in the instant case was unwarranted. It may be noted that the stipulation herein recites that the payment in this particular case was made at the exchange rate of \$3.21. True, this rate of exchange has little bearing on the question presented; nevertheless it raises an inference that the currency of the invoice here involved was in pounds sterling which were convertible at the "free" rate.

For the foregoing reasons, in arriving at the proper basis under the statute, section 522 (c), *supra*, for conversion of the pound sterling in which this invoice is expressed, we hold that it was the duty of the collector to use the rate designated "free" certified by the Federal Reserve bank on the date of exportation, viz, 3.475138.

The conclusion we have arrived at is in conformity with the reasoning and holding of the court in *Henry P. Isham v. United States*, Abstract 46189 (Old Series); *A. J. Bracher Co. v. United States*, T. D. 47935, 68 Treas. Dec. 404; and *Macksoud Importing Co. et al. v. United States*, T. D. 48442, 70 Treas. Dec. 114, affirmed in *United States v. Macksoud Importing Co. et al.*, 25 C. C. P. A. (Customs) 44, T. D. 49041.

Judgment will be rendered in accordance with the above holding.

Ekwalco, J.

Concurring: Cline, J.; Keefe, J.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

Suit No. 57467-K-1584-41

JOHN BARR, Plaintiff,

VS.

UNITED STATES, Defendant

JUDGMENT—July 30, 1943

This case having been duly submitted for decision to the Third Division of the United States Customs Court, and the [fol. 119] Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision.

It is hereby ordered, adjudged, and decreed that the protest in this case claiming that the currency of the invoice should have been converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under section 522 (c) of the Tariff Act of 1930, is sustained, and such buying rate is held to be \$3.475138.

Genevieve R. Cline, William J. Keefe, Wm. A. Ekwall,
Judges of the United States Customs Court.

Dated at New York, N. Y., this the 30th day of July 1943.

[File endorsement omitted.]

[fol. 120] UNITED STATES COURT OF CUSTOMS AND PATENT
APPEALS

Tuesday, April 4, 1944

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 4th day of April, A. D., 1944.

Present: Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, and Joseph R. Jackson, Associate Judges.

The court ~~was~~ opened for business in due form.

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

vs.

JOHN BARR, Appellee

Said appeal came on to be heard before the court and after hearing the arguments of counsel the cause was taken under advisement by the court.

[fol. 121] UNITED STATES COURT OF CUSTOMS AND PATENT
APPEALS, OCTOBER TERM, 1943

Customs Appeal No. 4461

Customs Calendar No. 34

THE UNITED STATES, Appellant,

vs.

JOHN BARR, Appellee

JACKSON, *Judge*:

On May 3, 1940 appellee (plaintiff below) imported a shipment of woolen fabrics from England to the United States at the port of New York. The merchandise was invoiced in pounds sterling. The consumption entry shows

a conversion of the pounds sterling to United States dollars at the rate of "4.035 official" per pound.

The importation was classified as woven fabrics under paragraph 1109 (u) of the Tariff Act of 1930. Concerning the classification there is no dispute.

The collector, following the instructions published in T. D. 50134 and T. D. 50146, converted the pounds sterling at the rate of \$4.035 per pound.

The section of the Tariff Act of 1930 under which foreign currency is converted into currency of the United States reads as follows:

Sec. 522. Conversion of Currency.

(a) **VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.**—Section 25 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide [fol. 122] revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) **PROCLAIMED VALUE BASIS OF CONVERSION.**—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) **MARKET RATE WHEN NO PROCLAMATION.**—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market

at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

Prior to March 25, 1940 the Federal Reserve Bank of New York, pursuant to section 522 (c), *supra*, certified daily to the Secretary of the Treasury a single rate of exchange for each of the currencies of foreign countries, including [fol. 123] the pound sterling. Subsequent to that date the said bank certified two rates of exchange for the pound sterling, one denominated "official" and the other "free."

On the date of exportation of the involved merchandise the bank certification was as follows:

Values of Foreign Currencies

[Value in U. S. Dollars]

Country	Monetary Unit	Noon buying rate for cable transfers in New York
Europe:		
• • •	• • •	• • •
England	Pound Sterling	4.035000 Official.
England	Pound Sterling	3.475138 Free.
• • •	• • •	• • •

The bank in a letter advised the Secretary of the Treasury that the dual rate certification was made by reason of information received that after March 25, 1940 all foreign exchange of certain countries, including the United States,

which was received in Great Britain would have to be surrendered to the Bank of England or its authorized agencies and that payment therefor would be made at a rate fixed by the British Treasury. The British Government had compiled a list of commodities which could be exported from Great Britain only after it had been shown that they were purchased either in the currency of one of the designated countries or with pounds purchased by such currencies from the Bank of England or one of its authorized agents at the rate fixed by the British Treasury.

Pursuant to section 522 (c) the Secretary of the Treasury issued on April 15, 1940 T. D. 50134, 5 F. R. 1447:

[fol. 124] *Conversion of currency—Canadian dollars, Newfoundland dollars, English pounds, Australian pounds*

Conversion rate for customs purposes of Canadian dollar, Newfoundland dollar, English pound and Australian pound

TREASURY DEPARTMENT, April 15, 1940.

To Collectors of Customs and Others Concerned:

Reference is made to the daily buying rates for foreign exchange which section 522 (c) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (c)) directs the Federal Reserve Bank of New York to certify to the Secretary of the Treasury. The list of rates certified by the Federal Reserve Bank of New York has included two rates for the Canadian dollar and the Newfoundland dollar since March 22, 1940, two rates for the English pound since March 25, 1940, and two rates for the Australian pound since April 1, 1940. In each case the higher rate has been designated "official," the other "free."

Whenever it is necessary to convert any of the above-mentioned currencies into currency of the United States for the purpose of the assessment and collection of duties upon imported merchandise, customs officers shall make such conversions on the basis of the rate designated "official," unless the rate proclaimed for the respective currency pursuant to section 522 (a) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (a)) varies from such "official" rate by less than 5 per centum. In the latter event the proclaimed rate should be used.

Until further notice only the "official" rates for the named currencies will appear in the weekly issues and bound vol-

UNITED STATES OF THE TREASURY DECISIONS. The pertinent facts and circumstances will be kept under review and, should future developments make it advisable, further instructions will be given.

(342.211)

H. Morgenthau, Jr., Secretary of the Treasury.

The relevant portion of T. D. 50146, dated May 11, 1940, reads as follows:

Foreign currencies—Rates of exchange

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS

Washington, D. C., May 11, 1940.

[fol. 125] *To Collectors of Customs and Others Concerned:*

The appended table of the values of certain foreign currencies as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under the provisions of section 522 (c), Tariff Act of 1930, during the period from May 3 to 9, 1940, inclusive, is published for the information of collectors of customs and others concerned.

By direction of the Commissioner:

(342.211)

W. R. Johnston, Deputy Commissioner of Customs.

Values of Foreign Currencies Certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under Provisions of Section 522 (c), Tariff Act of 1930

Period May 3 to 9, 1940, Inclusive			
Country	Name of Currency	May 3	* * *
Europe:		Dollars	
* * *	* * *	* * *	* * *
England	Pound sterling	4 4.035000	* * *
* * *	* * *	* * *	* * *

* (Official or Controlled.) * * * The rates for Canadian dollars, Newfoundland dollars, English pounds, and Australian pounds included in this list are for use pursuant to the directions in T. D. 50134.

Appellee protested the action of the collector in converting the pounds sterling of the invoice as aforesaid and claimed that the collector should have converted at the "free" rate of exchange on the date of exportation.

At the trial before the United States Customs Court, Third Division, the Government moved to dismiss the protest on the ground that it presented a non-justiciable question and [fol. 126] further that the protest and the accompanying papers show on their faces that no cause of action was presented.

The motion was vigorously pressed and the sufficiency of the protest as vigorously defended in briefs and oral arguments. The trial court denied the motion. Subsequently, at the trial on the merits the Government renewed its motion to dismiss, and the motion was held to have been properly denied.

The trial court in its decision on the merits reviewed the facts in the case, which among other things disclosed that whiskey, tin, furs, jute, rubber, and (later) diamonds, could not be exported from Great Britain unless it was shown by the exporter that payment for such merchandise was made either in the currency of the importing country or at the "official" rate. The court found in favor of appellee, holding that it was the duty of the collector to convert at the rate designated "free" as certified by the Federal Reserve Bank even though the Secretary of the Treasury had "arbitrarily" directed the collector to select the "official" rate. Judgment was entered accordingly, from which this appeal was taken.

The Government here contends that the protest does not state a good cause of action; that the action of the Secretary of the Treasury in publishing and directing the use of the official rate of exchange as the proper rate is final and conclusive; that the certification of two rates on May 3, 1940 was either improper or incomplete, and that if improper both rates should have been rejected and the rate for the quarter proclaimed under section 522 (a), (§8,2397) should have been used, and that if incomplete the Secretary should have acted as he did; and that, assuming the trial court was [fol. 127] correct in holding that it could review the action of the collector to determine whether or not he used the correct rate, the rate used by the collector was the correct one.

The appellant makes well-reasoned contentions as to why the protest does not state a good cause of action. However,

in view of the long continued holdings of this court we are of opinion that such contentions may not be upheld. In the case of *Carter v. United States*, 1 Ct. Cust. Appls. 64, T. D. 31033, this court quoted from the case of *Converse v. Burgess et al.*, 18 How. 413, as follows:

We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his design to make it the foundation of a claim against the Government.

In the *Carter* case, *supra*, the case of *Arthur v. Morgan*, 112 U. S. 495, was likewise referred to. That case approved the principal enunciated in the *Converse* case, *supra*. See also *Rice & Co. et al. v. United States*, 10 Ct. Cust. Appls. 165, T. D. 38403, affirmed 257 U. S. 536.

The protest herein gives notice of dissatisfaction with the decision of the collector for the reason that the currency of the invoice should have been "converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (a) * * *, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b)."¹¹ The protest further stated that the assessment of duties and taxes was illegal and void. [fol. 128] It is our opinion that under the liberal construction placed upon protests as above noted the collector was advised of the complaint in appellee's protest, and it was sufficiently pointed out what appellee claimed the rate of conversion should be. The collector was not confused or uncertain, because his decision was reviewed and affirmed by him.

We agree with the contention of appellant that the direction of the Secretary of the Treasury that the rate of conversion should be the official rate was binding on the Collector of Customs at the port of New York in view of section 502 (c) of the Tariff Act of 1930, which provides as follows:

(c) DUTIES OF CUSTOMS OFFICERS.—It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws;

and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs.

However, it is our opinion that the importer was entitled to protest because it was the collector's action against which the importer protested. There was in the instant case a variance of more than 5 per centum between the proclaimed value (\$8,2397) and the published exchange rate (\$4.935), which fact unquestionably was found by the collector, so that the case of *Fry & Friedsam v. United States*, 12 Ct. Cust. Appls. 486, T. D. 40694, relied on by appellee, is no precedent for his contention that the collector should have observed the difference in value of 5 per centum or more between the "official" and the "free" rates. The latter difference is not provided for by the statute.

Since it was the statutory duty of the collector to carry [fol. 129] into effect the instruction of the Secretary of the Treasury, the only review that can come before the courts is an inquiry as to whether or not such instruction was in conformity with the statute, section 522 (c). If such instruction shows upon its face that it conforms to the law, it is conclusive and binding, and furthermore is not subject to judicial inquiry as to its correctness. *J. K. Clarke v. United States*, 17 C.C.P.A. (Customs) 420, T. D. 43866.

We are of opinion that section 522 (c), *supra*, contemplates the finding of a single buying rate of exchange. This we think is obvious from a reading of the section. There is but one standard of currency in Great Britain; namely, the pound sterling. This is not controverted. If section 522 (c) were to be construed to mean that any number of buying rates on the New York market could be certified by the Federal Reserve Bank of New York, the ultimate result as far as tariff laws are concerned would obviously be "confusion worse confounded." Furthermore, anything in Great Britain could be purchased for pounds sterling converted at the "official" rate. Such is not the case with "free" pounds.

The Secretary of the Treasury published only the buying rate of pounds sterling at the "official" rate. That was the all-inclusive buying rate of pounds. Therefore, the publication by the Secretary of T. D. 50134 on its face con-

formed to the law and is conclusive and binding on the courts and will not be subject to judicial inquiry as to its correctness, and since the collector's action conforms to the direction of such decision it must be sustained.

It is not necessary to consider other contentions made herein, nor the history of the legislation leading up to the [fol. 130] present tariff statutes here involved in view of what has been said, nor is it necessary to discuss the many cases from the beginning of tariff history to the present time which have been cited by the parties.

For the reasons hereinbefore stated the judgment of the United States Customs Court is reversed.

Reversed.

Lenroot, Judge, sat during the argument of this case but resigned before the opinion was prepared.

[fol. 131] UNITED STATES COURT OF CUSTOMS AND PATENT
APPEALS

Monday, May 22, 1944.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 22nd day of May, A. D., 1944.

Present: The Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, reversed, and said cause is remanded to said court for proper proceedings in conformity with the opinion of this court herein.

[fol. 132] CERTIFICATE RE MANDATE OF COURT OF CUSTOMS
AND PATENT APPEALS

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 22nd day of May, 1944, was issued to the United States Customs Court on the 28th day of June, 1944.

Arthur B. Shelton, Clerk.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

(3004)

[fol. 134] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Court of Customs & Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,740, U. S. Court of Customs and Patent Appeals, Term No. 287. John Barr, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 26, 1944. Term No. 287 O. T. 1944.

(5004)